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Opinion following rehearing

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. WILLIAMS MARTINEZ-CARREON et al., Defendants and Appellants.	A141670 & A141679 (Marin County Super. Ct. Nos. SC173762B & SC173762C)

Appellants Armando Gil and Williams Martinez-Carreon (Martinez) were each convicted, following a jury trial, of two counts of attempted murder and one count of criminal street gang activity (or the gang offense). On appeal, Gil contends his retrial violated double jeopardy principles; the trial court abused its discretion when it denied his motion to sever his trial from that of codefendant Martinez; and the prosecution's expert witness was improperly permitted to relate case-specific testimonial hearsay. Martinez contends the trial court should have instructed the jury on the elements of aiding and abetting under the natural and probable consequences doctrine as to him with respect to the two attempted murder counts, and punishment on the gang offense should have been stayed under Penal Code section 654[1] since he was found guilty of attempted murder based on the same underlying conduct. Both appellants also make several sufficiency of the evidence claims regarding elements of the gang offense and the gang

[1] All further statutory references are to the Penal Code unless otherwise indicated.

enhancement, and further contend the court's instruction on attempted premeditated murder under the natural and probable consequences doctrine violated the California Supreme Court's recent holding in *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*). Both Gil and Martinez also contend the court erred when it excluded the Facebook statements of an uncharged alleged co-perpetrator, which they argue were admissible as declarations against penal interest. Finally, in a petition for rehearing, Martinez argues that Proposition 57, also known as the Public Safety and Rehabilitation Act of 2016 (Proposition 57) enacted while this appeal was pending, applies retroactively to his case and requires remand to the juvenile court for a transfer hearing.

We shall stay both Gil's and Martinez's three-year sentence for the gang offense. We shall otherwise affirm the judgment as to Gil. However, because we find that Proposition 57 applies retroactively to cases such as Martinez's that are not yet final on appeal, we shall conditionally reverse the judgment as to Martinez only and remand the matter to the juvenile court for a transfer hearing pursuant to Proposition 57.

PROCEDURAL BACKGROUND

On February 10, 2012, the Marin County District Attorney filed an information against Gil and Martinez.[2] In counts 1 and 2, Gil and Martinez were charged with the attempted murders of Elias Agueros and Marcos Lopez. (§§ 664/187, subd. (a).) It was alleged that the attempted murders were committed willfully, deliberately, and with premeditation (§ 664, subd. (a)) and for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1)(C).) It was further alleged that Martinez personally and intentionally discharged a firearm, causing great bodily injury to the two victims. (§§ 12022.53, subds. (d) & (e)(1), 186.22.)

[2] Martinez, who was 16 years old at the time of the offense, was charged as an adult under Welfare and Institutions Code section 707, subdivision (d)(2).

Alessandra Coyle was originally charged as a codefendant, but she later pleaded guilty to being an accessory after the fact (count 7), and the remaining charges against her (attempted murder, assault with a deadly weapon, and participation in a criminal street gang) were dismissed in exchange for her testimony at trial.

In counts 3 and 4, Martinez was charged with assault with a firearm on the victims. (§ 245, subd. (a)(2).) The information alleged related firearm use, great bodily injury, and gang enhancements. (§§ 12022.53, subd. (d), 12022.7, subd. (a), & 186.22, subd. (b)(1)(B).)

In count 5, Gil and Martinez were charged with assault with a deadly weapon (a hammer) against Rhea Tomita. (§ 245, subd. (a)(1).) It was alleged that the offense was committed for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1)(B).)

In count 6, Gil and Martinez were charged with criminal street gang activity. (§ 186.22, subd. (a).)

In counts 8 and 9, Martinez was charged with shooting at an occupied vehicle (§ 246) that was occupied by the two victims. The information alleged related firearm use, great bodily injury, and gang enhancements. (§§ 12022.5, 12022.53, subd (d), 12022.7, subd. (a), 186.22, subd. (b)(1)(B).)

In addition, as to counts 1, 3, and 8, it was alleged that Martinez personally inflicted great bodily injury on Elias Agueros, causing him to suffer permanent paralysis. (§ 12022.7, subd. (b).) Finally, as to counts 1, 2, 3, 4, 8, and 9, it was alleged that Martinez carried a firearm on his person and in a vehicle during the commission of a street gang crime. (§ 12021.5, subd. (a).)

The first trial began in October 2012, but the jury was unable to reach a verdict on any of the charged counts, and the court declared a mistrial. Gil moved to dismiss count 5 at the end of the first trial due to insufficiency of the evidence. The court granted the motion and entered a judgment of acquittal. (See § 1118.1.)

On November 20, 2013, at the conclusion of the second trial, the jury found both appellants guilty of attempted murder (counts 1 & 2) and found true the allegations that the offenses were committed with premeditation and deliberation and for the benefit of a criminal street gang. The jury also found both appellants guilty of the gang offense (count 6). The jury was unable to reach verdicts on the remaining charges against Martinez: assault with a firearm (counts 3 & 4) and shooting at an occupied vehicle

(counts 8 & 9), and the related enhancements.[3] The court subsequently dismissed those counts.

On April 9, 2014, the court sentenced each appellant to two consecutive terms of life in prison with the possibility of parole on counts 1 and 2, and to a consecutive term of three years on count 6.

Also on April 9, 2014, both appellants filed notices of appeal.

FACTUAL BACKGROUND

This case arises from a shooting and related crimes that took place outside of a Safeway store in Novato early on the morning of January 3, 2011.

Prosecution Case

Alessandra Coyle, Gil's girlfriend at the time of the offenses, testified that in January 2011, she lived in a townhouse on San Andreas Drive in Novato with Gil; Gil's brother, Edilberto Gil-Tzun; and her seven-year-old daughter, who is physically disabled.

Coyle had never been in a gang, but she had associated with gang members such as Gil, from age 14 to age 16. During her relationship with Gil, he was affiliated with the 18th Street gang in Marin, a gang that is associated with the Sureño gang. Gil had been affiliated with the gang since he was a teenager. Gil had a tattoo on his stomach of the numeral "18," which was associated with the 18th Street gang. His nickname was Smiley.

Coyle knew Martinez by the name Shadow. Gil and Martinez were friends, and Coyle had seen them together a number of times, including at her home, and had also seen them with other people she knew were suspected gang members. Gil also associated with a person named Mousey (Luis Rodriguez). Both Martinez and Rodriguez were at Coyle's home on December 31, 2010, into January 1, 2011. Gil was there also. Martinez had tattoos of "X" and "8" on the top of his hands, which mean "18." He now also had tattoos on his face, which he did not have on January 1, 2011.

[3] Apparently, the jury remained deadlocked, 11 to 1, on each of these counts and related enhancements.

On January 2, 2011, Gil arrived at Coyle's home around 7:00 p.m. He was wearing a pea coat; he also had a mustache at that time. Gil asked her to give him a ride to a friend's house in the Hamilton neighborhood. She drove Gil in her light tan colored 2005 Toyota Prius to the Bay Vista apartments in Hamilton. Coyle parked and Gil got out of the car. She saw him talking for a few seconds to at least eight males who appeared to be in their teens before he walked away with them. The males were wearing dark clothing, either black or blue. When asked whether she believed the males were associated with a gang, Coyle responded, "I pretty much assumed that they were his friends, so his friends are 18th Streeters, so, yeah."

Gil returned to the car a few minutes later and told Coyle he wanted a beer. She therefore drove him to a 7-Eleven store, where she bought him two beers and returned to the car. A black BMW car pulled up next to her car and Gil talked to the two people in the car for a couple of minutes. Coyle did not recognize the driver, but Martinez was the passenger. Coyle then drove to another location, where she parked on the street next to an apartment complex called Park Haven. Another car, a blue Corolla, pulled up. Gil grabbed his "spray can" from the back seat of Coyle's car, and he and the four people from the other car walked towards the apartment complex while she waited in the car. Approximately 15 to 20 minutes later, Gil and the other people came back; Gil got into Coyle's car and the other people got into the blue Corolla.

Gil then told Coyle to drive to Novato Street in the Canal district of San Rafael, which she did. She parked on Novato Street and saw the blue Corolla pass by and park somewhere else. Gil got out of the car and walked out of her sight. She waited in the car for at least 45 minutes. While waiting, she texted Gil a few times and he texted back, telling her he was almost there and to wait for him.

When Gil returned to the car, he was with Martinez and Rodriguez. They all got into Coyle's car and Gil told her to follow the blue Corolla to Woodland, an area in San Rafael. She drove to Woodland, went up a hill on a windy road, and parked in a pullout behind the blue Corolla. Gil, Martinez, and Rodriguez got out of Coyle's car and met up with five people from the other car, who were all dressed in dark clothing, some with

their hoods up. They all sat outside and drank and smoked for over an hour while Coyle remained in the car. Coyle texted Gil several times, but he did not respond.[4] He eventually returned to the car with Martinez and Rodriguez. Coyle said she had to go home, but Gil was "really drunk" and "nodding out a little bit."

Gil told Coyle to stop in Hamilton again on the way home, and she felt she had no choice but to do what he said. She was not sure of the time, but estimated that "it had to be around 11:00, 11:30, 11:45-ish, I think." She therefore drove back to Hamilton and stopped near the Creekside Deli. Gil got out of the car and went to a fence where there was tagging by a different gang. Gil may have had a spray paint can in his hand. Martinez and Rodriguez then got out of the car and the three men spray painted over the other writing on the fence in black paint. She believed they painted "18th Street stuff." Specifically, they painted "187 XV3" and "18 ST Canal." This tag was gang-related, as were the tags that it covered up.

After the three men returned to the car, Gil told Coyle to drive them to the Bay Vista apartments, where she had driven Gil earlier that night. He had her drive into the complex and stop near some people who were getting into a small white car. She observed two males getting into the front and rear passenger side of the car. Gil, Martinez, and Rodriguez were also watching the males get into the car. The white car then drove away briefly before coming back around in front of her car. The people in the other car were looking at her car and Gil was looking at them. She saw that there were four people inside the car, but she did not know who they were.

Gil told Coyle to follow the white car, which she did. As she drove, she heard Gil say, " 'If I get down, are you guys getting down?' " She thought he might have been asking if they were going to get out of the car with him. The white car turned into a Safeway store parking lot and Coyle did the same. When the white car turned left into a

[4] Coyle testified that she did not get out of the car and approach Gil because she never approached him when he was with his friends due to his "attitude." She did not believe she had any option other than doing what he told her to do. He was intimidating and had been violent toward her in the past, including beating her on two occasions.

parking spot, Gil said to pull up behind it, which she did. Gil, Martinez, and Rodriguez then "jumped out" of her car. Gil had a hammer in his hand and she saw him hit the front driver's side window of the white car with the hammer. Rodriguez was towards the back of Coyle's car, but she did not know exactly where. She saw Martinez with a gun in his hand; the gun could have been black, but she saw a bit of silver on it. She then saw Martinez shoot into the white car at least five times. She believed the gun was in his right hand, but she was not sure.

Gil, Martinez, and Rodriguez then ran back to Coyle's car and jumped inside. Coyle panicked and yelled at Gil, " 'You just fucked me so hard. What about the baby?' " The three men said, " 'Just drive. Just drive.' " She drove quickly out of the parking lot and got onto the freeway heading North. Gil directed her where to go and had her drop the three men off at the trailhead of an open space area. Coyle was nervous and scared. She told Gil she was done and to leave her be before she left and drove home.

On her way home, Coyle called her former employer, Marilyn DeBasio, and spoke with DeBasio's granddaughter, Lauren DeBasio, telling her that "something really bad had happened." Lauren said she would call her mom, Lisa Holmes. Coyle then called her own mother, who was taking care of Coyle's daughter. Coyle also told her that something really bad had happened, and asked her to "please watch my daughter."

When Coyle got home, she was frantic, scared, sad, and angry with Gil. She woke up her roommate, Gil's brother, Gil-Tzun. Lisa Holmes called her back and she told Holmes that something bad had happened.[5] After that phone call, Coyle took the SIM card out of her phone and flushed it down the toilet. She did this because it had Gil's information on it and he would be upset if police found it. Coyle then took her savings out of her closet, put it on the kitchen table, and wrote a letter stating that her mother had

[5] Lauren DeBasio and Lisa Holmes testified at trial about these phone calls. Both said Coyle sounded panicked and was crying. She said that something bad had happened, but did not say what it was. She told Holmes she had done something terrible, but had no idea why it had happened, and was concerned about her daughter ending up in foster care.

permission to take care of her daughter. She did all this because she knew the police were going to come to her home. She had seen a car briefly following her car after she left Safeway; she believed the person in the car had gotten her license plate number before turning around and heading back towards Safeway.

Approximately 10 minutes after she got home, Coyle heard helicopters. She went out onto her front porch because she knew the police would be looking for her. She was scared because she was going to be arrested. She saw police officers coming down her driveway and she said, " 'Here I am. I'm the one that you're looking for. That's my car. I'm the driver.' " The police asked her for her name and also asked if anyone else was in her house. When she said her roommate was inside, the police ordered Gil-Tzun out and had Coyle sit on the curb. She gave the officers consent to go into her home and told them where her car was. The police then arrested her and took her to the Novato police station.

Coyle testified that Officer Kory Jones interviewed her at the police station. He read her her rights and she agreed to talk to him. She told him there were three people in her car, but changed their names. She said Gil's name was Sleepy. On January 20, 2011, after she had hired a lawyer, her lawyer, a deputy district attorney, and Officer Jones came to the jail and met with Coyle. She "had the opportunity to fix [her] story," and told the truth about who was in her car and exactly what had happened. Jones showed her a photo lineup that day, and she identified Gil. She also identified a photo of the shooter, Martinez, who she identified to the officer as Shadow. She was shown another photo lineup, but was unable to identify any of the photos as depicting Rodriguez. During the January 20 meeting, the district attorney did not make any offers or promises to Coyle.

Subsequently, Coyle's attorney contacted the district attorney about making a deal, and he brought some documents to Coyle, which she read and signed on October 3, 2012. She agreed to testify and answer all questions completely and truthfully in any proceedings in this case in exchange for pleading guilty to a felony accessory after the fact charge, with exposure of three years in prison. She was released from jail following

the first trial in this case, after 22 months in custody. After she testified in prior proceedings, Coyle was scared and asked to be relocated to another jurisdiction because she believed it would be safer for her daughter and herself. She received a total of $1,000 in relocation funds, and two weeks in a hotel were paid for by the witness relocation fund. She also had received witness fees to stay in a hotel during the current trial.

On cross-examination, Coyle testified that she and Gil had exchanged letters while she was in jail, in which she expressed her love for him. She had also expressed the belief that Gil was a good stepfather for her daughter. Her biggest concern while in custody was the health and well-being of her daughter. In some letters, Coyle expressed jealousy of Gil's relationship with a woman named Jasmin. She knew Gil had been involved with Jasmin before the current offenses, and Coyle had heard Jasmin was visiting Gil in jail after he was arrested.

Coyle also wrote a letter to Gil in which she referred to "[a]ll the bullshit and lies, people saying things that are so dumb thinking they're right." In some letters, she wrote about Gil doing the right thing, i.e., clearing her name and telling the authorities the truth, that she had no involvement in what had happened. Ultimately, when she realized "that he wasn't going to do what was right," she needed to protect herself by making a deal to testify for the prosecution. She hoped that if she "fixed [her] story to the truth and not a lie," she would eventually be offered a deal.

Coyle testified that even before they got together, Gil had stopped dressing like a gangster. He also worked fairly consistently during their relationship, helping Coyle financially when she needed it. Most of the time they were together, they did family-oriented activities. Coyle also testified on cross-examination that on the night of the shooting, Gil was not wearing a hat of any kind. In addition, she had never seen him with a gun.

Edilberto Gil-Tzun, Gil's brother, testified that he had lived at Coyle's residence for two or three years before January 3, 2011. Most of the time, Gil was not living there. On January 3, 2011, when Coyle came home after midnight, Gil-Tzun was asleep. Gil-Tzun woke up when he heard Coyle on the phone with her mother. She seemed nervous

and emotional. She told him that something had happened, but did not say what it was. A Novato police officer arrived at the house and talked to Coyle. Gil-Tzun also talked to an officer. That morning, about 4:47 a.m., Gil-Tzun sent a text message to Gil that said, " 'Do not go to the house.' " He received the response, " 'Okay.' " Gil later said he had lost his phone and had not texted Gil-Tzun.

Gil-Tzun visited Coyle in jail after he met with Gil, who said to tell her "[t]hat everything is fine." Gil-Tzun visited Coyle in jail several times.

Gil-Tzun had never seen Gil hanging out with gangsters and he knew that Gil had not associated with gangsters since the birth of his child.

Novato Police Officer Andrew Barrington testified that within 30 minutes of the initial call regarding the shooting, he and five highway patrol officers went to Coyle's address in Novato, based on information that the license plate of the suspect vehicle was associated with that address. As Barrington approached the apartment, he saw a woman standing on the porch in front of the open front door. The woman looked scared and she yelled, " 'It was my car. I was the driver.' " The woman, identified as Coyle, gave officers consent to search her home. A gray Prius was found in the garage. Coyle told officers there was one other person in the house and that person was directed to come outside. When he came out, he was identified as Gil-Tzun. Another officer took an initial statement from Coyle, which Barrington recorded. Coyle was "crying, still upset, hyperventilating."

Rhea Tomita, one of the four people who were in the white car at the time of the shooting, testified that she is the ex-girlfriend of Shane Agueros, whose brother is Elias Agueros.[6] Marcos Lopez was Shane and Elias's friend. On the evening January 2, 2011, she was in the Hamilton area where she lived in an apartment with Shane and his parents. Approximately 11:00 p.m., Tomita, Shane, Elias, and Lopez got into Shane's white Toyota Corolla to go to Safeway. She was in the rear middle seat, Shane was driving,

[6] In this opinion, we will refer to Shane Agueros and Elias Agueros by their first names, to avoid confusion.

Lopez was in the front passenger seat, and Elias was seated to Tomita's right in the back. As they drove out of the apartment complex, Tomita noticed a car behind them. Shane slowed down because the car was tailgating them. Elias turned around and said he saw a girl driving and told Shane to disregard it.

When they arrived at the Safeway parking lot, as soon as Shane parked the car, Lopez said something like, " 'Look to your left.' " Tomita looked to her left and saw someone with a hammer on the left side of the car; the hammer had a yellow handle. Although she could not recall for sure, she thought she saw the person swing the hammer at the window. He had a look of surprise on his face and was looking towards her, though she was unsure if he was looking at her or past her. Then, within seconds, she heard loud noises like fireworks as someone shot at the car, and she felt something hit her back. After the gunshots, Shane called for Tomita to get out of the car. Elias was on top of her, so she sat him up and climbed over him to get out. She and Shane then ran into Safeway and yelled for someone to call 911.

The person with the hammer was a male with dark hair, wearing a beanie and a black and purple striped jacket.[7] He had a skinny build. At trial, she did not recall what his face looked like, but she remembered describing him to police right after the shooting as looking like he was Mexican and Asian. At the time of the shooting, she did not see the person who fired the gun. Tomita was not able to identify anyone in a six-person photo lineup she saw after the shooting.

Tomita testified that Shane and Elias were not gang members. She did not know if Lopez was a gang member. On cross-examination, she confirmed that Shane had a tattoo on his stomach that said, "MBK."

Shane testified that shortly before midnight on January 2, 2011, he drove Elias, Lopez, and Tomita in his white Toyota Corolla to Safeway in Novato, which was about a mile away from his home at the Bay Vista Apartments, where he lived with Tomita.

[7] A black beanie cap was subsequently found in the front passenger seat of Coyle's car. DNA recovered from the beanie was found to be a match for Gil.

They went to Safeway to get some food and movies. Lopez was sitting next to him in the front passenger seat, Elias was directly behind Lopez, and Tomita was in the rear middle seat. Before leaving the apartment complex parking lot, Shane saw a small car with bright headlights pull into a parking place. The same car then followed Shane's car out of the parking lot; it was following too closely. He pumped his brakes to warn the car to back off, which it did.

When Shane arrived at Safeway, he parked the car and turned off the ignition. He then heard a tapping on the driver's side window. He looked to the left and saw a person wearing a dark colored hoodie and holding a hammer with a yellow handle. When the prosecutor asked if he had testified at a prior proceeding about what the person had on his head, Shane said he believed he had described the person as wearing a black beanie. He was shown a black beanie at trial, which he said was "the spitting image" of the beanie the person was wearing. The person looked Hispanic or Asian, with a little mustache, and he also looked scared.[8] The person with the hammer did not break either window on the driver's side of the car. He did not see the car that had pulled up behind them. Shane got out of the car and told Tomita, who was screaming, to get out of the car. He and Tomita then ran into the store and told people inside to call 911.

Shane was unable to positively identify anyone as the person with the hammer in a photo lineup shortly after the shooting or at the first trial. He did, however, circle Gil's photo as the person in the photo lineup who looked most like the person with the hammer.

Shane was interviewed by Novato Police Officer Hinkle after the shooting. He told the officer that he had been at his friend Nicole Gilbert's house earlier that evening. During a subsequent police interview, he told Hinkle about a possible altercation

[8] On cross-examination, Shane testified that he had described the person to police as being five feet six to five feet seven inches tall and weighing 135 to 140 pounds. Age-wise, he appeared to be " '18 to 20's.' "

involving his associate, Justin Sheets. Shane did not know of any personal dispute over Gilbert that had occurred that day.

Shane testified that there were no guns in his car and that he had never been a gang member, although he had "hung out" with gang members, both Norteños and Sureños, since "you can't go to high school nowadays without knowing or seeing gang members." Lopez, who was a good friend of both Shane and Elias, had been a gangster at one time, but had stopped after the first of his three children was born, nine years earlier.

Elias, who was 26 years old at the time of trial, testified that in January 2011, he lived in San Francisco. But on the night of January 2, he was with Shane, Tomita, and Lopez at his father's home at the Bay Vista Apartments in Hamilton. Shortly before midnight, Elias, Shane, Tomita, and Lopez went to Safeway in Shane's white Toyota Corolla. They planned to rent a movie and get snacks. Shane was driving, Lopez was in the front right passenger seat, Tomita was in the rear middle seat, and Elias was in the rear right seat. As they were leaving Bay Vista, Shane slowed down because a car was tailgating them and its headlights were shining into the car. After the car backed off, Elias looked back and saw a red Prius with a female driver.

When they arrived at Safeway, Shane parked the car. As soon as Shane turned off the engine, a car pulled in at an angle behind their car, blocking them in. Elias saw someone jump out of the right front passenger seat of the other car. The person was a Latino male, wearing a black hooded sweatshirt; Elias did not recall if he had anything on his head. The person had a hammer, which he used to strike the driver's side window of Shane's car. As Elias was looking at that person, he heard and felt gunshots. He felt a shot in the neck, and was hit again at least once more.

Elias testified that at the time of the shooting, he, Shane, Tomita, and Lopez were not gang members. Elias believed Lopez was a former gang member, but he was never active when Elias knew him. As a result of being shot, Elias was a quadriplegic and had been hospitalized almost 20 times, including a hospital stay of over a month shortly before trial.

Novato Police Officer Alan Bates testified that shortly after midnight on January 3, 2011, he was dispatched to a Safeway store in Novato. When he arrived, he saw a small white sedan with two people inside, multiple holes in the rear window, and glass on the ground. He approached the car and saw that the person in the right rear seat of the car was extremely pale, with labored breathing. The person in the front seat appeared to be in pain and said it was difficult for him to breathe. He identified himself as Marco and said something like, " 'They came up from behind us and started shooting.' " Both passengers were transported to local hospitals.[9]

Bates testified that, in addition to the bullet holes in the rear window of the car, he saw a hole in the driver's side door that was not consistent with a gunshot, but was consistent with the impact of a blunt object such as a hammer.

Novato Police Officer Michael Ramirez testified that he was dispatched to the parking lot of the Safeway store in Novato at 12:13 a.m. on January 3, 2012. When he arrived at the scene in his patrol car, Shane ran up to him and yelled, " 'They shot my brother, they shot my brother.' " Ramirez approached the white car and saw that the rear window was cracked and had four holes in it, and the rear passenger window was smashed. There was a male in the back seat who was slouched over and bleeding profusely from the right side of his neck. In the front passenger seat, another male was bent over, holding his leg. Ramirez saw that there was a hole in his back, between his shoulder blades; it appeared to be a gunshot wound.

Approximately 10 minutes later, Ramirez spoke with Rhea Tomita, who was sitting on the curb, crying uncontrollably. She told him she had been seated in the middle back seat of the white car; Shane was the driver, Marcos Lopez was seated in the front

[9] Trauma Surgeon Chris Kosakowski, who treated Elias after the shooting, testified that he suffered from four life threatening gunshot wounds to his neck, upper back, right hand, and left forearm. He remained in intensive care from January to May 2011. As a result of a spinal cord injury, he was now a quadriplegic. Dr. Ann Vercoutere, who performed surgery on Lopez after the shooting, testified that Lopez had gunshot wounds in his back and shoulder. He was discharged from the hospital after a week.

passenger seat, and Elias was seated in the rear, next to her on the right side. Tomita said they had been driving from an apartment to Safeway and a car was following them, repeatedly flashing its high beams. After they arrived at Safeway and parked in the lot, she heard the sound of fireworks and felt glass hitting her back. She looked to the right side of the car and saw a male standing there holding a yellow-handled hammer in his right hand. There was also something in his left hand, but she could not recall what it was. She said the male had medium dark skin, with straight black ear-length hair. He was wearing a black and purple hooded zipped sweater with horizontal stripes and a black beanie. She described him as half Asian, half Hispanic.

Ramirez also spoke with a woman named Mary Eid, who was a witness to what had occurred. She was upset, but told him that she was on her way out of the Safeway parking lot when she saw the white car parked in the lot. There were two males standing near the rear of the driver's side of the vehicle and one male standing near the rear of the passenger side. After she drove by, she heard four loud gunshots. She immediately stopped her car and made a U-turn, at which time she saw two males getting into a blue four-door car. Eid could not describe the faces of the three males, but was able to describe the clothing of the male who was standing at the right rear passenger side of the car. She said he was wearing a gray hooded sweatshirt and blue jeans.

Novato Police Officer Nick Conrad testified that he found a black beanie on the front passenger seat of Coyle's car. A spray can cap was found on the front passenger seat. Conrad also examined the victims' car and found two bullet fragments.

About three days after the shooting, on January 6, 2011, Conrad and other officers contacted Martinez, who was on juvenile probation with a search condition, at his home. Martinez was 16 years old at the time; he was five feet six inches tall and weighed 140 pounds. Martinez said he had no knowledge of the shooting and denied knowing any of the involved parties. Martinez said he used to associated with Sureño gang members, but no longer did so. Conrad noticed that he had tattoos of an "X" and an "8" on his hands, but did not have any tattoos on his face. Officers found Martinez's phone in the family

car and subsequently downloaded its contents for analysis. No guns were found during a search of Martinez's home.

Criminalist John Yount testified that he examined three bullet fragments obtained from the scene and determined they were from a .38-caliber bullet, which is most commonly used in a revolver.

Novato Police Sergeant Daniel Jenner testified that after the shooting, he obtained surveillance video clips from the Safeway store. The clips showed the victims' white sedan enter the parking lot and pull into a parking spot around 12:10 a.m. Immediately afterwards, a silver or gray hatchback pulls up and comes to a stop behind the white car. Several subjects can then be seen walking from the gray hatchback toward the white car. A subject in dark clothing can be seen moving to the front driver's side of the white car. One or more subjects are visible standing to the rear of the white car and a flash of light appears from the outstretched hand of one of the subjects, which Jenner believed was a gunshot.

Initially, Jenner believed the video showed two individuals: the one in dark clothing and the one who stands in the back from whom the flash emanates. Subsequently, after reviewing the clips of the scene from multiple angles, he saw a third person in addition to the individual at the rear of the victims' vehicle and the one at the front driver's side window area. The third individual is at the rear driver's side of the victims' car. The video also shows the three people moving quickly back towards the gray hatchback.[10] The hatchback can then be seen driving north out of the parking lot. Shortly thereafter, two subjects appear to exit the white car and run towards and into the Safeway. The two people were later identified as Shane and Tomita.

Jenner testified that Gil, whose gang moniker is Smiley, was arrested on February 13, 2011. Martinez, whose gang moniker is Shadow, was arrested on May 26, 2011.

[10] On cross-examination, Jenner acknowledged that in his police report and at the previous trial, he had said the video showed two people exiting and returning to the gray hatchback. Since his prior testimony, Jenner had watched the video clips another 5 to 10 times, and again in court during the present trial, frame by frame.

Novato Police Detective Trevor Hall testified as an expert on "gangs, gang culture, gang identification, gang investigations, gang violence in Marin County, and gangs in the city of Novato." Since becoming a police officer in 2003, Hall had participated in at least 100 hours of training on gang identification, investigations, and culture. He had been a member of the California Gang Investigators Association for the past five years and frequently received written information from that organization. He also regularly reviewed bulletins from the National Gang Intelligence Center and had often represented the Novato Police Department in meetings with law enforcement from other Marin County cities regarding coordination of gang investigations. Hall also talked to other police officers about gang activity as it related to Novato and Marin County.

Previously, between 2001 and 2003, Hall was a correctional officer in Napa County, where he regularly came into contact with gang members, such as Norteños and the various cliques of Sureños, including 18th Street gang members. Since he became a police officer in 2003, he had participated in investigations of various gang related crimes, including graffiti vandalism, assaults, shootings, and stabbings. He had participated in arrests of gang members, had prepared search warrants, had spoken with gang members, had worked with other law enforcement agencies to investigate gang crimes, had managed a considerable amount of intelligence that officers obtained on gang members, and had reviewed reports of gang crimes. He had executed five to seven gang-related search warrants and had training and experience in recovering gang-related evidence, including photographing vandalism and connecting graffiti tags to the responsible gangs.

Hall also had training and experience in reviewing cell phone media, including text message data, photographs, and voice mails, and had experience reviewing gang websites for current information about particular gangs, including photographs of individuals, clothing, tattoos, terminology and slang, and hand signs. Over the past five years, he had participated in "gang enforcement nights," in Marin County, where police contacted known gang members in the community, and had participated regularly in meetings with other investigators "to speak about gang crimes and gang members within

the county." He had also been a member of the FBI Safe Streets Task Force, in which he held the position of Special Deputy Federal Agent with the FBI. He had cross-referenced gang associates, members, and affiliates. He had previously testified once in the Marin County criminal court as a gang expert.

Hall had been in contact with Sureño gang members since 2001. The Sureño gang, whose members are predominantly Hispanic, originated in Southern California and Mexico. Sureño gang members affiliate with La Eme—the Mexican Mafia—which is a nationwide prison gang. Sureños' most common rival is the Norteño gang, which pays homage to the prison gang Nuestra Familia.

There are several subsets or cliques under the Sureño "umbrella." The 18th Street gang is a Sureño clique and is a dominant gang in Marin County. Hall had contacted at least 100 Sureños in his career, including at least 40 18th Street gang members in Marin County. He had also spoken to gang members about their criminal gang activity, including such activity in Novato. He was familiar with the common signs and symbols of the 18th Street gang in Novato and Marin County. He had spoken with Sureño gang members about their criminal street gang philosophy and how they identify themselves, including by tattoos.

Hall had had 5 to 15 law enforcement related contacts with 18th Street gang members in Marin County. His knowledge of the 18th Street gang was also based on conversations with other officers and law enforcement agencies, and reviews of reports and field ID cards. The West Side Wynos gang is also a Novato clique; Hall had had at least 10 personal contacts with West Side Wino gang members. Sureños have rivalries within their own gangs. In fact, according to FBI crime statistics, intra-gang violence is the most prevalent type of gang violence nationwide. In Hall's training and experience, there are rivalries between 18th Street gang members and other Sureño gang members.

Sureño gang members use the color blue and the number 13—the 13th letter of the alphabet, M, for the La Eme affiliation—to identify themselves. 18th Street gang

members use the number 18 to identify themselves.[11] Hall had seen many photographs of 18th Street gang members displaying gang hand signs, most commonly the letter E. Gang members also display tattoos on any part of the body. Tattoos indicate a person's affiliation with a particular gang and adding more tattoos can indicate status. In his training and experience, Hall had looked at different symbols, drawings, and writings to determine the gang that is depicted in them.

In Hall's experience, gang members usually go by a moniker or nickname. When communicating via text or email, gang members leave cell phone or email "signatures" indicating their affiliation with a gang. Hall had reviewed search warrants and text messages in investigations involving suspected 18th Street gang members.

Hall was familiar with the Hamilton area of Novato, which is most associated with the West Side Wynos gang. The area in San Rafael most associated with the 18th Street gang is the Canal district. 18th Street gang members "predominantly live in the San Rafael area, but they consider themselves to be in control of the entire county."

Hall explained that hierarchy in gangs is based on respect, and the older a gang member is and the longer he has been in the gang, the more he is respected. "Respect is something that gang members obtain and achieve by showing their devotion, their faithfulness and participation towards" their gang. It is common for older gang members to recruit younger gang members to commit crimes both because younger gang members, if caught and prosecuted, could receive a lesser sentence and because it bolster's the gang's membership. Also, 18th Street gang members recruit non-members, i.e., "associates," to assist them in crimes to increase the gang's membership and because, with multiple people committing a crime, it is more likely to be successful.

Hall testified that a subset within a larger gang might try to obtain respect from another smaller subset of the gang. A more dominant subset like the 18th Street gang could do something to establish themselves as the most dominant and superior clique.

[11] This could be symbolized by, for example, the numbers 1 and 8, XV3, XVIII, or X8.

Hall was familiar with investigations and contacts in which gang members had felt disrespected. If members of one gang crossed out another gang's graffiti or tag, that would demonstrate dominance and disrespect to the other gang. A gang such as the 18th Street gang might resort to violence to send a message to another gang. In Hall's experience, a member of a Sureño gang might shoot a member of another Sureño subset. The 18th Street gang has had rivalries with other Sureño cliques, including the Sur Trece gang and, the West Side Wynos.

18th Street gang members commit criminal acts in public to benefit the 18th Street gang, Sureño gang members, and criminal street gangs in general. The gangs are benefitted because a violent act, such as a shooting in public, instills fear in witnesses and victims and makes them hesitant to come forward with information about gang activity or to testify against gang members. Gang members commit violent acts like shootings for several possible reasons: to obtain more respect from gang members in their own or a rival gang, to show their devotion to their gang, and to advance themselves in the gang. Gang members are unlikely to inform against each other.

Hall testified that the definition of a criminal street gang is three or more people who share a common sign or symbol and whose primary activity is committing certain crimes enumerated in the Penal Code. Based on his training and experience, Hall opined that the 18th Street Sureño gang is a criminal street gang. Its primary activities include weapons possession, assault, assault with deadly weapons including firearms, attempted murder, stabbing, witness intimidation, criminal threats, and some narcotics offenses. He based this opinion on cases he had personally investigated or assisted with, information he had learned from other investigators in Marin County, bulletins distributed in the county regarding gang crimes, and news publications regarding gang crimes occurring in the county.

Hall believed there are three levels of participation within the 18th Street gang, including associates, members, and shot callers. A shot caller is someone who has been a gang member for a considerable period of time, has put in a substantial amount of work for the benefit for the gang, and provides direction to younger gang members and

possibly nonmembers. This opinion was based on investigations in which he had participated and conversations with other law enforcement officers in Marin County. Hall also knew there were approximately 75 active participants in the 18th Street gang in Marin County. Hall had learned this from conversations with officers in the crime suppression unit of the San Rafael Police Department and in the Novato Police Department's neighborhood response team who had recently come into contact with gang members and obtained that information.

Hall was familiar with the shooting at the Safeway in Novato on January 3, 2011. He was also familiar with Gil and Martinez. He described tattoos on Martinez's face around his eyes and lower forehead, which he testified were "18th Street membership tattoos." They included one that read " '1 West,' with an S"; one that read " 'Side 8 St,' with an R," which, together, meant "West Side 18th Street, San Rafael." Martinez also had an "X" and an "8" on the back of each hand, which depicted 18th Street gang membership. Martinez did not have the tattoos on his face on January 3, 2011. Gil had "18" tattooed on his stomach.

Hall testified about gang validation reports, which are a tool used to "solidify" the investigator and prosecutor's belief that someone is a gang member. Such a report begins with a summary of the investigation, a brief history of whatever gang the suspect belongs to, and information about the suspect, including a list of arrests, contacts, and investigations associated with the suspect that are deemed gang related. Hall prepared gang validation reports on Gil and Martinez.

Martinez was born in 1994 and his gang moniker was Shadow. There had been three instances in Novato in which Martinez had been contacted or listed in a crime report. Police documented contacts with Martinez as a suspected gang member in 2008, after his parents called the Novato Police Department because they were concerned that he had carved "XVIII" and "18" into his chest. In preparing his gang validation report on Martinez, Hall reviewed and took information from police reports stating that in July 2009, Martinez allegedly stole his mother's vehicle. He was also involved in vehicle burglaries in Novato and San Rafael and was found with the stolen items in a stolen car

with David Medina; a BB gun was found nearby. Investigators believed that both Martinez and Medina were Sureño gang members.

In preparing his gang validation report on Martinez, Hall had also reviewed a February 2010 probation violation report, from which he learned that a San Rafael police officer went to Martinez's residence to conduct a probation search and found a folder with some abbreviations written on it, including " 'EK,' " for " 'Everybody Killer," "187" for murder, and " 'WS' " for "West Side." Also found was a blue belt with a buckle with "X" or "8" on it. Martinez's probation had included a gang condition that prohibited him from associating with gang members or possessing gang related clothing. When questioned, Martinez admitted he had been an 18th Street Sureño member for about two years. Hall also had reviewed a probation violation report in another case involving Martinez, which stated that in April 2010, several police officers saw Jimmy Lucero Tejada, a documented 18th Street gang member, and Martinez walking together in San Rafael, in violation of Martinez's gang probation condition. Finally, Hall learned from another police report that Martinez was suspected of throwing a bottle at a victim in the Canal district of San Rafael after the victim was pointed out as someone who had previously cooperated with law enforcement.

In light of all of this information used to prepare the gang validation report on Martinez, Hall opined that Martinez was an active participant in the 18th Street Sureño criminal street gang. This opinion was based on Martinez's documented history within Marin County, information from law enforcement agencies showing that he had a continuous association with criminal street gang members, his arrests and police contacts while in the presence of 18th Street gang members, his admission of gang membership, his having been contacted in possession of clothing suggestive of 18th Street gang membership, the tattoos on his hands and face, and his participation in the offenses in the present matter. Based on the information he had gathered, Hall also believed Martinez had engaged in conduct consistent with the pattern of criminal activity committed by 18th Street gang members.

Hall further opined that Martinez had engaged in conduct that promoted, furthered, or assisted felonious criminal conduct on the part of members of the 18th Street gang. Hall based this opinion on the fact that Martinez had been charged in this case with the commission of a felony in association with other gang members, he had shown a continuous association with other gang members, he had displayed gang clothing and tattoos, and had been loyal to 18th Street gang members. In response to a hypothetical question based on the alleged facts underlying the current offenses, Hall further testified that this scenario was consistent with promoting, furthering, or assisting the felonious conduct of an 18th Street gang member. Hall's opinion was based on his training and experience with conducting gang investigations, conversations he had had with gang members, courses he had taken that included teachings about similar gang crimes, and his knowledge that gang members have a propensity to commit similar violent acts in public.

Hall believed that three gang members committing the hypothetical offenses together enhanced their ability to carry out the crime successfully, established possible alibis, and made it unlikely that they would snitch on each other. In addition, the significance of the gang members striking out another gang's tags was that the gang members were "exerting their strength over the other gang" and "showing that they're the ones in charge." Similarly, all three gang members getting out of a car and surrounding an occupied car, with one of the gang members shooting into that car, demonstrated that they were the dominant gang and were not going to tolerate being disrespected.

Hall also prepared a gang validation report for Gil, which included prior contacts, a suspect profile, Hall's opinion as to whether Gil was a suspected gang member, information on the 18th Street gang, and a synopsis of the present case. Gil was born in 1984 and his gang moniker was Smiley.

Based on his review of police arrest reports, Hall ascertained that in 2003, Gil allegedly threw a bottle at a victim, causing a laceration on the victim's arm. The victim reported that Gil had threatened to kill him. Gil was arrested for assault with a deadly weapon, vandalism, and providing false information to a peace officer. In June 2004,

police found Gil at a location in the Canal district of San Rafael with several other known 18th Street gang members, in violation of his probation conditions. He was wearing a shirt that said, " 'RIP Creeper' " and " 'BEST,' " which is an abbreviation for Barrio Eighteenth Street. Also in June 2004, an officer attempted to contact Gil to register him as a gang member, but Gil refused to participate in the registration process. Subsequently, officers saw Gil walking with another suspected 18th Street gang member in the Canal district. When officers attempted to contact them, Gil fled on a bicycle; the other person was found with a sharp object and arrested.

Then, in 2006, Novato police officers responded to a report of an assault with a deadly weapon and contacted two victims who reported that they were approached by two Hispanic males who appeared to be carrying knives. One of the suspects told a victim he was going to kill the victim before slashing a tire on the victim's vehicle with an ice pick and fleeing the scene. Gil was subsequently contacted and the victim identified Gil in a field lineup as the person who threatened him. During that investigation, police learned of the "18" tattoo on Gil's stomach and suspected that he was an 18th Street gang member.

Hall opined that Gil was an active participant in the 18th Street gang based on his gang tattoos, his arrest for participation in gang crimes, his consistent association with 18th Street gang members and his being arrested or detained in the presence of other gang members. For many of the same reasons, Hall opined that Gil's conduct was part of a pattern of criminal conduct in which 18th Street gang members engaged. Hall also believed that Gil's conduct promoted, furthered, and assisted the felonious conduct of 18th Street gang members. This opinion was based on his continuous association with known criminal street gang members, his active participation in gang crimes, the fact that he had gang tattoos on his stomach, and the fact that he has a propensity to commit violence against suspected rival gang members.

Based on a hypothetical question involving the alleged facts of the present offenses, Hall opined that such conduct was consistent with conduct engaged in by an 18th Street gang member for the benefit and promotion of the 18th Street gang. This

opinion was based on "strength in numbers"; committing the crime with other 18th Street gang members; and the fence with an 18th Street gang tag over a Westside Wynos tag, or vice versa, which was a sign of disrespect and could cause Gil to feel obligated to ensure that neither he nor his gang was disrespected.

Hall was familiar with Marcos Lopez, one of the victims in this case. He was a Sureño gang member in Marin County, who had at one time claimed to be a member of Richmond Sur-Trece, which is a Sureño gang clique. He had tattoos indicating he was a Sureño gang member, including "SSL," which is an abbreviation for South Side Locos and the number "13." His gang moniker was Diablo. In addition, Nicole Gilbert, now deceased, had been a well-respected and high ranking 18th Street gang member. She was either related to or good friends with Lopez.

Hall was familiar with Justin Sheets in Novato, whose gang moniker was "JLOC." JLOC had appeared on the spray painted fence across from the Creekside Deli and was written over in black. Hall described the three tags visible on that fence, including, first, blue spray painted "13 WSW" for 13 Sureño West Side Wynos, with the gang member moniker, "JLOC." There were also three blue dots, which are an indicator of Sureño gang membership. On top of that was a red "XIV," the Roman numeral translation of 14 and "Norte," which indicated a Norteño gang. Finally, painted in black on top of the other two tags were "187 XV3 ST," "666," and "XV3 18 Street Canal." Hall explained that "187 is murder [as stated in the Penal Code], XV3 is 18, three 6's together is 18, 18th Street, and Canal," which referred to where the taggers allegedly were from. Hall believed these final tags were "the 18th Street gang members declaring that they're willing to commit murder against any one of the other two."

Hall also testified to predicate offenses committed by three 18th Street gang members. Andres Celis was convicted in May 2010, of assault with a deadly weapon of a rival gang member and participation in a criminal street gang. Arias Erikson was convicted in August 2010, of robbery and participation in a criminal street gang. Jimmy Lucero Tejada, an 18th Street gang member was convicted of assault with a deadly weapon and participation in a criminal street gang.

Police obtained search warrants for the cell phone records of phone numbers associated with Coyle, Gil, and Martinez—who had two phone numbers**,** including one with a 707 area code—during the relevant timeframe.

Jim Cook, a wireless expert, had analyzed call detail records associated with, inter alia, appellants and Rodriguez, and the locations of those phones around the time of the Safeway shooting. Their cell phone numbers were in communication with each other before the shooting. The cell phone activity was located in the vicinity of the Bay Vista apartments and the Safeway in Novato.

Cook also testified about text messages to and from the numbers associated with appellants after the shooting.[12] A translated text from Gil-Tzun to Gil stated, " 'Don't go to the house,' " to which Gil responded, " 'Okay' " and " 'Tell them you do not know anything[!]' " Gil-Tzun also sent a text to Gil that police had arrested Coyle. Martinez and Rodriguez texted each other after the shooting, with messages including, " 'Hey fool, we need to get to Richmond . . . ,' " " 'Smiley's girl got arrested' " and " 'She might snitch us out . . . .' "

Marta Selvi, an expert in translating between Spanish and English, testified that a text message from Martinez's phone stated, "I have a three-eight semi." Selvi believed the Spanish word in the text, "semia," was an abbreviation, just like the English word, "semi." Selvi acknowledged the Spanish word, "semilla," means "seed."

Gil's Defense Case

Rahn Minagawa, a clinical and forensic psychologist, testified for Gil as an expert on criminal street gang activities. Minagawa had reviewed Hall's gang validation report on Gil, and did not believe the prior incidents described in the report from 2003 and 2004 were sufficient to establish that he was a gang member, although his presence in 2004 at a gathering for a deceased gang member established that he was associating with gang

[12] Cook testified that the text message document on which his testimony was based and which was admitted into evidence was based on Central Time, rather than Pacific Time. Hence, two hours had to be subtracted from the time each text message was listed as having been sent.

members. Based on Hall's report, Minagawa found that "from July 2004 until January 2011, there doesn't appear to be anything that the police or law enforcement indicated that he was a gang member or engaged in gang activities. . . ." A person who has not had any contact with gang culture for over six years would not be considered a "shot caller," which Minagawa described as a more experienced gangster who is looked up to by younger gang members and who can direct the activities of the gang.

Based on a hypothetical question about Gil's family and work responsibilities, Minagawa opined, based on his research and experience, that individuals involved with gangs tend to age or "socialize out" of gang culture. The absence of gang related clothing, social media posts, or other indicia of Gil's gang involvement would support Minagawa's opinion that he was aging out of the gang. Based on the information in Hall's report, Minagawa did not believe Gil was an active 18th Street gang member.

Minagawa also testified that he had reviewed text messages between a person known as Mousey (Rodriguez) and a person who identified himself as Sleepy (apparently Lopez) from the West Side Wynos. The communications appeared to involve a personal dispute regarding disrespect of a woman.

Gil testified that he was born in Yucatan, Mexico in 1984. His first language was Mayan and he learned Spanish at age 10. He arrived in Marin County in 2000, at age 16. Gil met Coyle when he was 16 or 17, and she was about 14. They were briefly friends and then began a sexual relationship, which lasted about three years. Sometime before 2008, they began dating again and Gil moved in with Coyle to help take care of her daughter, who was physically disabled.

Gil acquired the "18" tattoo on his stomach when he was 16 years old. He had recently arrived in the United States and was living in the Canal area of San Rafael. He began to feel "he was part of" the people who hung out in the area, and decided to get the tattoo on his own. Gil was never jumped into a gang, but considered himself a gang member when he was 16 and 17. When gang members found out about his tattoo, a group of six members said he should not have gotten it without letting them know. They

disciplined him for 18 seconds, and then told him he had to do a job for them, which he did not do.

By the time Gil and Coyle got together in approximately 2008, Coyle told him she had already moved away from gangsters, and between 2008 and 2010, Gil attended no gang meetings. In August 2010, Coyle learned about Gil's sexual relationship with another woman named Jasmine by looking at a text message on his phone. Coyle and Gil got into a verbal fight about the relationship.

On December 31, 2010, Gil worked until 5:00 p.m. at his landscaping job. He did not drive, so Coyle generally picked him up from work and drove him other places in her car. That evening, he and Coyle ate dinner and then he went to spend the night with Jasmine in a hotel. The next morning, New Years Day, Jasmine drove them to Richmond, where they had lunch. After lunch, they went to a park and Gil drank nine beers. Jasmine then drove to the Canal area of San Rafael, where they took a walk. Gil was still drinking. After their walk, around 6:00 or 6:30 p.m., they stopped at the Creekside Deli so Gil could buy another beer. He noticed that the fence across the street from the deli, which always had gang graffiti painted on it, was painted with the number "187."

Jasmine then dropped Gil off at his house, where Coyle was waiting for him. Gil learned that Coyle's daughter was with Coyle's mother in the Hamilton area, and he wanted to go see her. Coyle therefore drove him to her mother's house, but the lights were off and her daughter was sleeping. After that, as Coyle was driving in the Bay Vista area, Gil saw a friend, Justin Sheets, and asked Coyle to stop the car so he could say hi. Gil got out of Coyle's Prius and drank a beer with Sheets while Coyle waited in the car. After about 10 minutes, as Gil was getting back into Coyle's car, he saw some people arriving in a black BMW. They included Luis Rodriguez, known as Mousey, whom he had met a couple of times in the prior few days through Martinez; Martinez; and Brian Herrera. Gil said hello to them, got back in Coyle's car, and told Coyle he wanted to buy a beer. Coyle therefore drove to a 7-Eleven store in Novato and went inside to buy the beer. While she was in the store, the black BMW arrived; Martinez and Herrera were in

the car, but he did not see Rodriguez. Gil talked to Martinez until Coyle returned to the car. She then drove him to Pioneer Park in Novato to see his friend Ivan, who was with a couple of friends.

After a short time at the park, Gil told Coyle he wanted to go see his daughter who was living in the Canal district of San Rafael. Once there, Coyle parked and he got out of the car. When he saw the lights were out in the apartment, he left. As he returned to Coyle's car, he saw Martinez, Herrera, Rodriguez, Ivan, and Ivan's two friends, all of whom lived nearby. They talked for a little while and then went to a hill near Woodland to drink. Martinez and Herrera did not join them because Martinez was on probation and had to be home by 10:00 p.m. Rodriguez rode to Woodland in Coyle's car with Gil and Coyle. Coyle followed Ivan, who drove the other friends in a blue Corolla, stopping on the way to Woodland to pick up a friend, Jeffrey Olmstead or "Gato," who owed Gil money. Once in Woodland, they listened to music, drank tequila, and smoked marijuana for an hour and a half or two hours. Rodriguez also consumed hallucinogenic mushrooms and offered some to Coyle, who primarily stayed in the car. Coyle asked Gil for permission to eat the mushrooms. He said okay, and saw her chewing three or four of them.

While in Woodland, around 11:00 or 11:30 p.m., Coyle began texting Gil to say they should go home because she had to work the next day. Eventually, Gil, Rodriguez, and Olmstead got into the car and Gil asked Coyle to drop Rodriguez and Olmstead off in the Hamilton area, which she agreed to do. He also asked her if they could stop and buy a beer on the way home. Coyle then followed the blue Corolla that Ivan was driving. Gil was in the front passenger seat of the Prius, next to Coyle; Rodriguez was in the rear passenger seat, and Olmstead sat in the middle, between a child's car seat and Rodriguez. Gil was so drunk that he fell asleep during the drive from Woodland to Hamilton.

Gil woke up when he heard Coyle screaming. He did not know where they were, nor did he hear any shots or see anyone get out of the rear of the car. He saw someone open the car door and get in; it was Rodriguez, who then exited the car again and brought Olmstead back inside. Coyle was screaming and crying, saying to Rodriguez, "What the

fuck are you doing?" and "Get the fuck out of my car." Gil turned around, saw Rodriguez pull out a gun, point it at Coyle, and say, "Shut the fuck up. Just drive." Gil said, "Don't talk to her like that," and Rodriguez pointed the gun at Gil's chest and said, "You too, shut the fuck up. I have one more bullet for you." Coyle was screaming and crying. She said, "What about the baby? What about the baby?" She also said to Rodriguez, "You fucked me really hard." Gil told her to drive, which she did.

As they left the Safeway parking lot, Rodriguez told Coyle to drive him to Santa Rosa, but Gil told him not to do that, to let Coyle go because she had a daughter. Gil said he would stay with Rodriguez instead. Rodriguez told Coyle that if she said anything, he would kill her and her family. Gil convinced Rodriguez to let Coyle go and she dropped the three men off near the San Marin freeway exit. As Rodriguez was getting out of the car, he threatened to shoot Coyle, her grandmother, and her sister if she told anyone he "shot these people."

Gil testified that he never saw a yellow handled hammer in Coyle's car and he never got out of the car at Safeway. He was sleeping when the shooting occurred.

After Coyle dropped off Gil, Rodriguez, and Olmstead, she texted Gil, "I love you, no matter what." He responded to her text and then asked Rodriguez what he had done. Rodriguez said he had shot his girlfriend Nicole Gilbert "because she was cheating on him" and he was jealous. Rodriguez borrowed Gil's phone because his was dead. As Rodriguez made a phone call on Gil's phone, Olmstead and Gil walked away. Gil walked to downtown Novato, where he took a bus to San Rafael. From there, he took another bus to Richmond. He never got his phone back and never saw Rodriguez again. He learned that Coyle had been arrested when he was watching television news. He called Rodriguez and his brother Gil-Tzun. Gil subsequently went to see Gil-Tzun, who said that Coyle had been arrested and Nicole Gilbert had threatened Gil-Tzun when he went to court to see Coyle.

Gil told his brother to go see Coyle in jail and gave him a note to give to her, directing her to tell the truth. Coyle responded with a message that she could not tell the truth because her family was going to get killed. She told Gil to tell the truth. He sent

another message to Coyle through his brother, telling her to blame someone else, specifically, Martinez. He said this because he was afraid that Rodriguez would hurt his or Coyle's family if they told the truth. Coyle responded, "Okay." Since the shooting, Gil had talked with Rodriguez, who said that if Gil or Coyle told the police he had done the shooting, he would kill their families.

Subsequently, Gil called the Novato police, saying he wanted to report a shooting in Novato, but was told the detective was not available and to call back. Gil then called the San Rafael police and said he wanted to report a shooting in Hamilton, but was told he had to call the Novato Police Department. Gil called the Novato Police Department again and was given the phone number of a detective, but he did not call the detective because he realized the police were looking for him, after seeing it in the newspaper.

After the shooting, Gil continued working in Marin County and was living in Richmond until February 13, 2010, when he went to visit his daughter in Rohnert Park. After he arrived at her house, the police came and arrested him. While he was in custody, he and Coyle exchanged numerous letters. He wrote to her that on the night of the shooting, he had been unconscious and did not know what had happened.

Gil testified that the lid found in Coyle's car was not for spray paint, but was a lid to a product he used to clean the car. The black beanie found in the car was his, but he was not wearing it on the night of the shooting.[13] That night, he was wearing a black dress shirt and blue jeans, with no jacket or sweatshirt. He was also clean shaven. Rodriguez was wearing a gray hoodie that night. Also, Gil saw Martinez hand his phone to Rodriguez when they were in the Canal district earlier that evening. Gil further testified that he did not own any gang clothing, photographs, or memorabilia.

On cross-examination, Gil acknowledged that he was convicted of a felony, making a criminal threat against the mother of his child on May 11, 2011, while he was

[13] The parties stipulated at trial that the black beanie belonged to Gil and that the major portion of the DNA mixture on the beanie had the same DNA profile as Gil, but not Martinez or Coyle.

in jail in the present matter. He also was convicted of another felony, unlawful sexual intercourse with a minor, on May 27, 2011. He had committed that crime previously, at age 19.

Gil testified that Martinez had told Gil that he was an 18th Street gang member. Gil had considered Martinez a friend and a good person. Gil did not know whether Rodriguez was an 18th Street gang member. Gil acknowledged that people called him Smiley, but denied that it was his gang moniker. He also denied being a gang leader or even a gang member.

Gil testified that Olmstead had died before trial and he had heard that Nicole Gilbert was also dead. Coyle's testimony regarding what happened just before and during the Safeway shooting was a lie. She lied because she was scared. When Gil was arrested, he told the arresting officer that he was in Mexico at the time of the shooting.

Mary Jo Eid testified that she was in the Safeway parking lot at the time of the shooting. She was driving out of the parking lot when she heard a loud boom and then what sounded like three or four gunshots. She looked over her shoulder and saw someone standing near the passenger side back door of a white car, looking inside the car. She also saw another person running. The person standing by the car was dressed in blue jeans, tennis shoes, and a gray sweatshirt or jacket and appeared to be holding something in his right hand. She also saw two people rushing to get into a Blue Element automobile, but she was not sure they were the same people she had seen near the white car. Eid saw a male who was screaming, "Call 911. They just killed my brother." There was a girl with him.

Eid saw only two people near the white car. Police officers interviewed her approximately 15 minutes after the incident. She never told an officer that she saw three people, and the officer was mistaken when he wrote in his report that she said she saw three people.

Shedrick Williams, an employee at the Novato Safeway testified that he had shown police a video clip from the store video surveillance that was recorded on the night

of the shooting. When shown a video clip at trial, Williams testified that he only saw one person approach the white car.

Nicholas Berg, who was a Novato police officer at the time of the shooting, testified that he interviewed Shane shortly after the shooting. Shane said he heard several gunshots and observed a person approach the white car from the driver's side and tap a hammer on the window. Shane exited the car and chased after the person, but returned to the car when he heard that his brother had been shot. Shane described the person who had tapped on the window with a hammer as a Hispanic or possibly Asian male adult in his mid-20s, with a mustache and wearing a dark colored sweatshirt.

Berg viewed at least two Safeway surveillance videos that night, three or four times each. He saw two subjects exit the gray Prius and point a weapon, and then saw several muzzle flashes. He then observed one of the subjects run north through the parking lot. Berg acknowledged that, in his report, he stated that both subjects fled on foot north through the parking lot. One of them was wearing a dark colored shirt and the other was wearing a lighter colored shirt.

Adam Raskin, Gil's private investigator, testified that he had inspected the Safeway parking lot many times since the shooting. Raskin took a number of photographs of the scene, which showed a double shadow effect due to cross lighting in the parking lot. Raskin owned a 2005 Prius, which he parked at the Safeway as he believed Coyle's Prius had been parked, near a small compact car with a larger SUV to its left. Raskin took photographs from the driver's seat of his Prius, looking out the rear window at the angle from which he believed Coyle would have looked. From that angle, Raskin was unable to see if a person was standing by the driver's side window of the small car. Raskin could not say if the view from which he took the photographs was a fair and accurate depiction of what Coyle testified she saw through her car window. Raskin also took a still photograph of the surveillance video showing a person he believed to be the shooter. The person was wearing a gray or light colored hooded sweatshirt with the left arm leaning in towards the car.

Simon Richard Estrada Oltman testified that he lived near the Creekside Deli. On the afternoon of January 2, 2011, he noticed some gang graffiti on the fence across the street from the deli and took a picture of it. The picture showed a red " 'XIV' " and " 'NORTE' " painted over a blue set of numbers. Subsequently, "probably" about a couple of hours before the shooting, Oltman was driving home and saw a third tag in black spray paint, over the others, which read, " '187 XV3 Street.' "

Smyrna Sanchez testified that she met Gil in February 2008, when they worked together at a retail store. Sanchez had two brothers who were members of the 18th Street gang. Sanchez never saw Gil dress like a gang member, display gang signs, or hang out with gang members. Nor did he ever tell her he was a gang member.

Susan Ragazzone testified that she and her husband, who is a church pastor, met Gil in 2000, when he was 16 years old. At that time, Gil visited her three daughters at the Ragazzone home in the Canal district three or four times a week. She saw an "18" tattoo on his stomach when he was 17 years old. During the time she knew him, Ragazzone never saw Gil dressed as a gangster or in possession of gang paraphernalia. She did not believe he was a gang member when she knew him. On cross-examination, Ragazzone testified that she was not aware that Gil had been convicted in May 2011, of unlawful sex with a minor and making a criminal threat.

Martinez's Defense Case

Lilia Carreon, Martinez's mother, testified that in late 2010 and early 2011, she was living in San Rafael with her family, including Martinez. The entire family slept in the living room of the apartment. On January 2, 2011, Martinez arrived home before 10:00 p.m. In December 2010 and January 2011, Martinez never wore gray colored clothing, only black. He was right handed. A photograph taken at the hospital in April 2011, just after Carreon had given birth to twins, showed that Martinez did not have a tattoo on his face at that time.

Silverio Avila, Martinez's stepfather, testified that on January 2, 2011, Martinez came home by 10:00 p.m., as he was required to do during that time period. The family then went to bed, but Martinez went outside just before 1:00 a.m., wearing a black shirt

and black shorts. Avila went back to sleep but later that morning, around 7:00 a.m., he saw Martinez in bed. Martinez always dressed in black in December 2010 and January 2011. He did not have a light colored sweater or sweatshirt at that time.

Erick Menendez, who rented a room from Martinez's family, testified that on January 2, 2011, he saw Martinez on his bed using his cell phone about 11:30 p.m.

Jocelyn L. testified that Martinez is her daughter's father. Jocelyn went to middle school and high school with Rodriguez. She was familiar with his voice and knew that he was left handed. Martinez regularly called and texted Jocelyn from two different cell phone numbers. On January 2, 2011, Jocelyn texted Martinez's 707 phone number to tell him she was pregnant. Later, at 11:48 and 11:49 p.m., she received texts from the 707 cell phone number asking how she knew she was pregnant. At 11:52 p.m. she received a phone call from Martinez's 707 cell phone number. She recognized the caller as Rodriguez and they had a short conversation in which Rodriguez asked if Martinez was with her and Lopez said no. Rodriguez called again just after the first call, but Lopez hung up. Seconds after the second phone call, Jocelyn texted the 707 phone number that she could not talk "ryte now." According to Jocelyn, she sent this message when she realized that Rodriguez had Martinez's phone.[14] There were also several texts sent between the 707 number and her number between 1:22 and 2:19 a.m. on January 3.

Jocelyn testified that Martinez's gang moniker was Shadow. She did not know if he had any gang friends or if he was friends with Gil.

Brian Herrera was unavailable as a witness and his testimony from the first trial was read to the jury. Herrera was 17 years old at the time of the first trial and considered Martinez a good friend. He testified that on January 2, 2011, he picked Martinez up in a black BMW and drove to Rodriguez's house in San Rafael. Herrera, Martinez, and Rodriguez then drove to Nicole Gilbert's home in Hamilton. When they arrived at the Bay Vista apartments, there was a gang get-together of more than 10 people taking place

[14] When asked whether Rodriguez would be talking to her about her pregnancy, Jocelyn said he "was going along with it, I guess. . . ."

at Gilbert's home. Rodriguez and Gilbert got into an argument. At Martinez's suggestion, Herrera and Martinez drove to the Canal district. Smiley (identified as Gil) and Rodriguez arrived five minutes later in a small white car driven by a white woman. At some point, Rodriguez approached Martinez and asked to borrow his phone because Rodriguez's phone was dying, and Martinez gave Rodriguez a phone. Herrera then dropped Martinez off at his home in San Rafael because he was on a curfew. It was between 9:30 and 10:00 p.m.

Herrera testified that Martinez's gang moniker was Shadow. Herrera did not belong to a gang.

Martinez, who was 19 years old at the time of trial and 16 years old on January 2, 2011, testified that he was arrested in this case on May 26, 2011. He was a member of the 18th Street gang from the west side of Santa Rosa, not San Rafael. He started associating with the gang when he was eight or nine years old and was "godfathered" into the gang through an older cousin. He was beat up by members of the 18th Street gang from San Rafael when he was 12, after they mistook him for a Norteño gang member. That experience turned him off to that gang, but he later began hanging out with people associated with Canal Street and the San Rafael 18th Street gang, including at school, at the mall, playing sports together, and going to birthday parties and weddings. Martinez got the "X" and "8" tattoos on his hands when he was 15. He got the tattoos on his face around April 28, 2011, to show that he was not just an 18th Street gang member, but a member from the west side of Santa Rosa.

Martinez testified that he knew Lopez, one of the shooting victims, from when he was younger and would see Lopez at the mall. He denied shooting either Lopez or Elias on January 3, 2011. Regarding whether different Sureño cliques fight, Martinez explained that "anybody that's a Sureño gang member cannot attack each other" and may be disciplined for doing so.

The first time Martinez was on probation, it was for taking his mother's car, which she reported stolen. He was never previously charged with a violent crime and, contrary to Hall's testimony, he denied throwing a bottle at anyone.

On December 31, 2010, Martinez attended a barbecue at Coyle's home in Novato. Coyle, her daughter, Gil, Rodriguez, and David Medina were also there. On January 1, 2011, Brian Herrera slept over at Martinez's house.

On the afternoon of January 2, 2011, Martinez texted " 'Tengo una semia de trez ocho' " to a person named Pancho Ramirez. According to Martinez, the text meant, " 'I have one seed of a .38' "; the Spanish word for seed is "semilla." Martinez was referring to having a shell casing, not a live round. When Ramirez texted, " 'cuanto,' " which could have meant "how much" or "how many," Martinez responded " 'I only have one, a homie gave it to me.' " Ramirez then texted, " 'Let me have it.' " If he had been referring to a semi-automatic pistol in the text, Martinez would have written, "semiautomatica," not "semia."

Around 5:00 or 6:00 p.m. on January 2, Herrera picked Martinez up from Jocelyn L.'s house in a black BMW and they went to pick up Rodriguez. Herrera then drove to the Hamilton area around 7:00 p.m. They stopped in the Bay Vista area within Hamilton and went to the home of Nicole Gilbert, who was Rodriguez's girlfriend at the time.[15] Gil was already there, talking to Justin Sheets, as well as a number of other people. After about 40 minutes, Martinez and Herrera went to a 7-Eleven. Martinez saw Rodriguez there in a car with Coyle and Gil. Gil and Martinez had had several phone and text conversations, as Martinez attempted to find out where Gil was. That was how Martinez ended up at the 7-Eleven, where he and Gil talked through the car windows. Martinez told Gil that he and Herrera were heading to the "400 buildings" on Canal Street in the Canal district of San Rafael.

When Martinez and Herrera arrived on Canal Street around 9:00 p.m., they parked near the 400 buildings and about 20 minutes later, Gil and Rodriguez arrived together with Coyle in Coyle's Prius. They socialized in that area for 20 to 25 minutes until

[15] Early that morning, Martinez had texted Rodriguez that Gilbert had referred to Rodriguez on her MySpace page. She had written about being with another guy and not being satisfied with Rodriguez, calling him "a bitch or biggest faggot."

Martinez got a voicemail from his mother about 9:40 p.m., reminding him that it was getting close to his curfew. Martinez told Gil and Rodriguez that he and Herrera were leaving, and Rodriguez asked to borrow Martinez's cell phone because his was about to die. Martinez gave him one of his two phones, the one with a 707 area code. Martinez never went to the Woodland location Coyle had described in her testimony.

Martinez arrived home at 9:55 p.m. His mother, stepfather, and sister were there, and they all went to bed. Later, he saw one of his roommates, Erick Menendez, walk out of the bedroom and into the bathroom. At 12:42 a.m., he called Jocelyn, but she did not answer. At 12:57 a.m., he went outside and called her again. While he was outside on the patio, around 1:05 a.m., he heard a car and saw Rodriguez outside, wearing a gray hooded sweatshirt. Martinez went down the stairs to meet Rodriguez, who returned his cell phone. Rodriguez, who had bloodshot eyes, smelled like alcohol, and did not have his balance, thanked Martinez for letting him borrow the phone. When Martinez asked him "what the fuck he was doing here," Rodriguez responded, " 'I shot somebody.' " Martinez said, " 'You're stupid,' " and Rodriguez then said, " 'I just shot some fools.' " Martinez again said, " 'You're stupid,' " and asked, " 'Did any of you get caught?' " Martinez said, " 'No, but I think someone followed us.' " Martinez again said, " 'You're stupid,' " and told Rodriguez "to go home and text me or call me whenever he got there to see if he was all right." Later that morning, Martinez texted Jocelyn and his then girlfriend, Michelle M.

On January 3, 2011, after 9:00 a.m., Gil called Martinez and told him that Coyle had been arrested. Martinez then sent a text to Rodriguez, which said, " 'Ey foo, we need to get to Richmond.' " Rodriguez texted back, " 'Why?' " and Martinez texted, " 'Smiley's girl got arrested.' " Later, when Rodriguez texted, " 'My mom don't let me out' " because he had come home late the day before, Martinez responded, " 'U have to go foo.' " After Martinez questioned him further about whether he wanted to go to Richmond, Rodriguez texted, " 'I do wanna go homie but my mom.' " After a phone call between Martinez and Rodriguez, Martinez texted, " 'She might snitch us out.' " Martinez explained at trial that he was talking about Rodriguez's mother when he wrote

the text, and meant that he was on probation and did not want to get a violation for being with another gang member. He was not referring to Coyle in the text.

Later that day, Martinez met up with Rodriguez at the transit center. Rodriguez told Martinez that Coyle had been present when he shot people, and Martinez responded, " 'That's your problem. I don't want to have nothing to do with it.' " Rodriguez said he was leaving for Mexico. Martinez then went to the house of his girlfriend, Michelle M., in Novato.

On January 6, 2011, Martinez texted David Medina that he (Martinez) needed to get out of his house because the "Pigs" "might come." He also texted, " 'Can u come thru,' " " 'I'll hit u up wen am in a safe place.' " Medina responded, " 'Wow, I bet you trippen. Nobody knows shit, so they ain't gonna do shit. . . .' " Martinez testified that when he texted that he had to get out of his house, it was because he had heard that probation officers were searching probationers and asking them about the shooting.

Martinez denied being in Coyle's car on the night of the shooting. He also denied shooting a gun at anyone in the Safeway parking lot or tapping a hammer on the white car parked there.

On cross-examination, Martinez testified that he had known Gil for six years and Rodriguez for seven or eight years. Martinez believed Gil's tattoo was from an 18th Street gang, but it did not specifically say which clique. Rodriguez was an 18th Street Canal gang member and Martinez was an active 18th Street gang member and was on probation. He testified that he felt loyalty towards his fellow gang members.

Martinez was arrested on May 26, 2011. Martinez acknowledged that, when interviewed by Detective Jenner, he told Jenner that Gil was in the same gang he was in, the 18th Street gang. Although Martinez had gotten tattoos on his face after the shooting, that did not give him a higher rank within the gang.

Martinez was aware that Rodriguez had a personal dispute with Lopez, known as Sleepy, from the West Side Wynos. On the night of the shooting, Lopez was not at the Bay Vista apartments when Martinez arrived. The only dispute he saw was between Rodriguez and Gilbert. He would not consider a dispute between two Sureño gang

members over the disrespect of a woman a crime for the benefit of a gang. He would consider it a personal dispute.

Rebuttal

Jenner testified that he interviewed Martinez the day Martinez was arrested. Martinez said he had no personal knowledge of the shooting and had not been in contact with Gil since the previous year or with Rodriguez since two years earlier. Martinez indicated that Gil and Rodriguez were "18" or 18th Street gang members. When Jenner said Martinez had been identified as the shooter in the incident at Safeway, Martinez did not seem "overly surprised or shocked." Martinez did not mention that he had given his cell phone to Rodriguez, that he was driven in a black BMW by Brian Herrera, that he had been home by 10:00 p.m. on the night of the shooting, or that Rodriguez had come to Martinez's house in the early morning to return Martinez's phone and had admitted he had shot some people.

Jenner had had several previous contacts with Justin Sheets, a white male who went by the moniker JLOC and was a member of the West Side Wynos, a Sureño subset. Jeffery Olmstead, an 18th Street gang member known as Gato, was never considered a suspect or witness in this case.

An arrest warrant was issued for Rodriguez and Jenner attempted to find him. Based on Facebook login information, Jenner learned that Rodriguez was in Mexico.

DISCUSSION

I. *Double Jeopardy and Severance*

Gil contends retrial of the attempted murder and the gang offense counts violated the double jeopardy provisions in the United States and California Constitutions because those counts were based on the same evidence as the assault with a deadly weapon count, as to which the trial court had previously granted a motion for acquittal. Gil further contends that even if double jeopardy principles were not violated, the trial court erred when it failed to either sever his trial from that of Martinez or otherwise exclude evidence related to the hammer wielding incident.

A. *Trial Court Background*

Gil was initially charged in count 5 with assault with a deadly weapon (§ 245, subd. (a)(1)) against Rhea Tomita, who had been seated in the center rear seat of the white car. After both parties had rested during the first trial, Gil moved for a judgment of acquittal as to counts 1, 2, 5, and 6, pursuant to section 1181. The court granted the motion as to count 5 only, the assault charge, and entered a judgment of acquittal on that charge. The court based its ruling on the insufficiency of the evidence to sustain a conviction, explaining: "Even if we were to assume that [Coyle] was referring to the left rear window" when she testified that Gil struck the driver's side window with a hammer, "the question then becomes whether or not his striking that left rear window at the top left corner constitutes an assault upon the person seated in the center of the back seat. . . . [¶] There is no reason to conclude that even if Gil struck the left . . . back window of the car, that action would result in the application of force upon Tomita. . . ."

The court further found, however, with respect to counts 1 and 2, the two attempted murder charges, that "the evidence is substantial to sustain a conviction[;] corroboration is found in the text messages and GPS settings on his phone, as well as the testimony of the witness Coyle." The court concluded the evidence was also sufficient to sustain a conviction on count 6, street gang activity, based on his gang participation. In denying the motion as to these other three counts, the court also relied on the testimony of the occupants of the white car, who described "the person with the hammer as looking part Mexican, part Asian and wearing a beanie, which by stipulation was connected to Gil, the physical description as being fit and skinny is consistent with his physical description. So there is sufficient corroboration that he was the one who was at the scene with the hammer. . . ."

Before the second trial, Gil moved to sever his trial from that of Martinez. He also sought to exclude any testimony that he wielded the yellow-handled hammer and struck the victims' car window, arguing that admission of such evidence would violate the prohibition against double jeopardy due to his prior acquittal of the assault count.

At the hearing on the motion, after defense counsel argued that all facts that would support the assault charge must be excluded, the prosecutor noted that when the court granted the motion to acquit, it had done so only as to whether Gil "used the hammer with the yellow handle when he approached the car to assault that particular victim[;] the court never ruled that [Gil] was not a gang member using that hammer as part of his participation in this crime under the theories that I am alleging in this case. [¶] If the court had done that, then he would not have denied the motion as to count 1 and count 2, which was an attempted murder, because he, Gil, is liable and subject to liability . . . on the theory of aiding and abetting or natural and probable consequences, his conduct in engaging or participating in that or taking the first advancement, where he went to the driver's side and hit the window, which caused everybody in the car to look to their left. When they looked to their left, that's when, as we allege, [Martinez] fired into the car. So it happened concurrently. . . ."

The court denied Gil's motion, explaining that the determination of the court in the prior trial that Gil did not commit the crime of assault with a deadly weapon against Tomita only meant that there was insufficient evidence that he wielded the hammer with the intent to assault her, "as opposed to simply break the window, to startle, to open up a clear view of who was in the car or some other reason." The court therefore denied the motion for severance and the motion to exclude testimony related to Gil wielding the hammer at the time of the alleged offenses.

B. *Legal Analysis*

1. *Double Jeopardy*

Gil now argues that, "inasmuch as the facts surrounding the assault with a deadly weapon against Tomita are the same as those supporting the prosecutor's theory that [Gil] acted as an aider and abettor, the correct motion would have been to dismiss all charges against [Gil] under well-established double jeopardy principles. [Citation.]"[16]

[16] Gil asserts that we may review this issue, notwithstanding his failure to argue in the trial court that all counts should be dismissed on double jeopardy grounds, for several

The Fifth Amendment prohibits any person from being tried twice for the same offense. (U.S. Const., 5th Amend.; accord, Cal. Const., art. I, § 15.) Accordingly, with respect to the trial court's judgment of acquittal under section 1118.1 on count 5, assault with a deadly weapon against Tomita, double jeopardy principles precluded retrial of that count. (See *People v. Trevino* (1985) 39 Cal.3d 667, 698-699, overruled on another ground in *People v. Johnson* (1989) 47 Cal.3d 1194, 1219.)

In arguing that *all* counts should have been dismissed on double jeopardy grounds "as a result of the trial court's judgment of acquittal as to the hammer-wielding incident," Gil primarily relies on the United States Supreme Court's decision in *Yeager v. United States* (2009) 557 U.S. 110 (*Yeager*). The court in *Yeager* first recounted the facts and analysis in *Ashe v. Swenson* (1970) 397 U.S. 436, 443, 445 (*Ashe*): "In *Ashe*, we squarely held that the Double Jeopardy Clause precludes the Government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial. In that case, six poker players were robbed by a group of masked men. Ashe was charged with—and acquitted of—robbing Donald Knight, one of the six players. The State sought to retry Ashe for the robbery of another poker player only weeks after the first jury had acquitted him. The second prosecution was successful: Facing 'substantially stronger' testimony from 'witnesses [who] were for the most part the same,' [citation], Ashe was convicted and sentenced to a 35–year prison term. We concluded that the subsequent prosecution was constitutionally prohibited. Because the only contested issue at the first trial was whether Ashe was one of the robbers, we held that the jury's verdict of acquittal collaterally estopped the State from trying him for robbing a different player during the same criminal episode. [Citation.] We explained that 'when an issue of ultimate fact has

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reasons: because the issue raises purely a question of law, California courts have held that constitutional issues can be raised for the first time on appeal in various circumstances, the court's ruling showed that any request for a dismissal of all counts would have been futile, and such review would foreclose an ineffective assistance of counsel claim. Assuming for purposes of argument that the issue is not forfeited, as we shall explain, we nonetheless conclude it is without merit.

once been determined by a valid and final judgment' of acquittal, it 'cannot again be litigated' in a second trial for a separate offense. [Citation.] To decipher what a jury has necessarily decided, we held that courts should 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' [Citation.] We explained that the inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.' [Citations.]" (*Yeager*, at pp. 119-120, quoting *Ashe*, at pp. 439-440, 443-444, 446, fn. omitted.)

The court in *Yeager* first noted that the facts in that case were distinguishable from those in *Ashe* in that the trial involved multiple counts, some of which resulted in acquittal and some in a mistrial. But the court found that "for double jeopardy purposes, the jury's inability to reach a verdict on [certain] counts was a nonevent" that was entitled to no weight in resolving the double jeopardy question. (*Yeager*, *supra*, 557 U.S. at p. 120.) The court then applied *Ashe's* reasoning to the facts of the case before it, in which the federal government alleged that the petitioner, in concert with other Enron executives, had purposefully deceived the public about the virtues of a fiber-optic telecommunications system in order to inflate the value of Enron's stock and thereby enrich himself. (*Yeager*, at pp. 112-114.) The jury acquitted the petitioner of securities and wire fraud counts, but failed to reach a verdict on insider trading counts. (*Id*. at p. 115.) The Supreme Court held that retrial on the deadlocked counts was prohibited under double jeopardy principles since, "if the possession of insider information was a critical issue of ultimate fact in all of the charges against petitioner, a jury verdict that necessarily decided that issue in his favor protects him from prosecution for any charge for which that is an essential element." (*Id*. at p. 123.)

In the present case, Gil asserts that "[t]he hammering incident was an integral part of the State's theory that [Gil] initiated the shooting incident by distracting the passengers with his tapping or hammering on the window. [Citation.] Under the federal precedents discussed above, the issue of the hammer wielding was decided in [Gil's] favor when the

trial court ordered a judgment of acquittal as to the assault with a deadly weapon." We disagree.

Unlike *Yeager*, Gil cannot show that the facts to be decided on the remaining counts were either identical to the issue decided by the court's judgment of acquittal on the assault count or were "necessarily decided" by that judgment. (See *Yeager*, *supra*, 557 U.S. at pp. 119-120.) As the court explained when it denied Gil's motion to sever or exclude evidence—and as the court in the first trial explicitly stated—the acquittal in the prior trial was based on lack of substantial evidence that Gil jumped out of Coyle's car and hit the white car's window *with the specific intent to assault Tomita*. That " 'issue of ultimate fact' " (*ibid*.) plainly was not identical to the issues to be decided on the other counts, i.e., whether Gil hit or tapped on the window for some other reason, such as to distract or startle the people in the car to facilitate the shooting. (Compare *Ashe*, *supra*, 397 U.S. at pp. 445-446; *Yeager*, at pp. 119-120, 123.) The hammer evidence thus was admissible to help prove that Gil committed the distinct offenses alleged in counts 1, 2, and 6, which were not dismissed following the previous trial.

For these reasons, the court's failure to dismiss all charges against Gil did not violate the double jeopardy clause. (See *People v. Catlin* (2001) 26 Cal.4th 81, 124 [collateral estoppel "doctrine does not 'exclude in all circumstances . . . relevant and probative evidence that is otherwise admissible . . . simply because it relates to alleged criminal conduct for which a defendant has been acquitted' "].)

2. *Severance*

Section 1098 provides in relevant part: " ' "When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order[s] separate trials." ' " This section reflects the Legislature's preferences for joint trials. (*People v. Letner & Tobin* (2010) 50 Cal.4th 99, 149-150.) The court may, however, " 'in its discretion, order separate trials "in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony."

[Citations.] [¶] We review a trial court's denial of a severance motion for abuse of discretion based on the facts as they appeared at the time the court ruled on the motion. [Citation.] If the court's joinder ruling was proper at the time it was made, a reviewing court may reverse a judgment only on a showing that joinder " 'resulted in "gross unfairness" amounting to a denial of due process.' " ' [Citation.]" (*Ibid*.)

Here, Gil bases his claim that severance or exclusion of evidence was necessary on the fact that evidence admitted at trial, specifically the hammer related evidence and evidence that the hammer wielder was wearing a black beanie like the one found in Coyle's car with Gil's DNA on it, placed him "in jeopardy yet again on the precise same facts as those presented at the first trial, upon which he was acquitted by the judge trying that case."

As already discussed in part I.B.1., *ante*, Gil's related double jeopardy claim is without merit and the challenged evidence was admissible. For the same reasons, the court did not abuse its discretion when it denied his motion to sever or exclude evidence. *People v. Letner & Tobin*, *supra*, 50 Cal.4th at p. 150.) Nor has Gil shown that joinder " ' " ' 'resulted in "gross unfairness" amounting to a denial of due process.' " ' " (*Ibid*.)

II. *Sufficiency of the Evidence Issues Related to the Gang Offense Conviction and Gang Enhancement*

The California Street Terrorism Enforcement and Prevention (STEP) Act was enacted by the Legislature in 1988. (Pen. Code, § 186.20 et seq.) "Underlying the STEP Act was the Legislature's recognition that 'California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods.' (Pen. Code, § 186.21.) The act's express purpose was 'to seek the eradication of criminal activity by street gangs.' " (*People v. Gardeley* (1996) 14 Cal.4th 605, 609 (*Gardeley*).)

"As relevant here, the STEP Act imposes certain penal consequences when crimes are committed 'for the benefit of, at the direction of, or in association with any *criminal street gang*.' (Pen. Code, § 186.22, subd. (b)(1), italics added.) A 'criminal street gang,' as defined by the act, is any ongoing association of three or more persons that shares a

common name or common identifying sign or symbol; has as one of its 'primary activities' the commission of specified criminal offenses; and engages through its members in a '*pattern of criminal gang activity*.' (*Id*., subd. (f), italics added.) Under the act, 'pattern of criminal gang activity' means that gang members have, within a certain time frame, committed or attempted to commit 'two or more' of specified criminal offenses (so-called 'predicate offenses'). (Pen. Code, § 186.22, subd. (e).)" (*Gardeley*, *supra*, 14 Cal.4th at pp. 609-610, fn. omitted, disapproved on another ground in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13 (*Sanchez*).)

In the present case, both appellants were found guilty of active participation in criminal street gang activity in violation of section 186.22, subdivision (a), which provides in relevant part: "Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang shall be punished by imprisonment in the county jail for a period not to exceed one year, or by imprisonment in the state prison . . . ." (§ 186.22, subd. (a).)

The jury also found true, as to each appellant, the allegation that the attempted murders were committed for the benefit of a criminal street gang, pursuant to section 186.22, subdivision (b)(1)(C). As noted, subdivision (b)(1) of section 186.22 provides for additional punishment for "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ."

Here, appellants challenge the sufficiency of the evidence with respect to some of the elements that must be proven to support a conviction or enhancement under section 186.22. "In determining whether the evidence is sufficient to support a conviction or an enhancement, 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential

elements of the crime beyond a reasonable doubt.' [Citations.]" (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1224 (*Vy*).)

A. *Expert Testimony Based on Case-Specific Testimonial Hearsay*

Before addressing appellants' sufficiency of the evidence challenges, we will address Gil's claim that the court improperly permitted Hall, the gang expert, to relate case-specific testimonial hearsay regarding his gang related criminal history. In particular, he argues that Hall's statements regarding Gil's "involvement in the 2003 bottle throwing incident, his 2004 attendance at a gang member's memorial gathering, his 2004 refusal to register as a gang member, riding away on a bike from an approaching officer in 2005, [and] the 2006 incident in which [he] reportedly punctured someone's tire with an ice pick, contained at least three levels of hearsay: the testifying officer's account of what various investigating officers had ascertained from various witnesses during their investigation." Gil further argues that this recitation of his criminal history constituted "a prototypical example of an expert acting as a conduit for testimonial hearsay the prosecution could not otherwise present directly."[17]

After briefing in this case was complete, our Supreme Court decided *Sanchez, supra*, 63 Cal.4th 665, in which it clarified the law on the proper scope of expert testimony,[18] as follows: "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth. If the case is one in which a prosecution

[17] Gil notes that defense counsel objected to the use of hearsay from police reports in describing appellant's criminal history, citing the right to confrontation and the Sixth Amendment.

[18] Because the parties were aware when they filed their briefs that *Sanchez* was pending before our Supreme Court, and therefore fully addressed the issues ultimately decided in that case, we have determined that additional briefing on the *Sanchez* decision itself is unnecessary to our resolution of Gil's contentions. In addition, although Martinez's appellate counsel does not raise this issue on appeal, our conclusions apply equally to him, in terms of both error and prejudice.

expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Id*. at p. 686, fn. omitted; see *Crawford v. Washington* (2004) 541 U.S. 36, 68.) The court defined testimonial hearsay as "statements about a completed crime, made to an investigating officer by a nontestifying witness . . . unless they are made in the context of an ongoing emergency . . . or for some primary purpose other than preserving facts for use at trial." (*Sanchez*, at p. 694.)

The *Sanchez* court disapproved its prior decision in *Gardeley*, *supra*, 14 Cal.4th 605 "to the extent it suggested an expert may properly testify regarding case-specific out-of-court statements without satisfying hearsay rules." (*Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. 13.)[19] The court also made clear that its decision "does not affect the traditional latitude granted to experts to describe background information and knowledge in the area of his expertise. Our conclusion restores the traditional distinction between an expert's testimony regarding background information and case-specific facts." (*Id*. at p. 685.) The court further noted that an expert "may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so" and also may assume the truth of another witness's properly admitted testimony "in a properly worded hypothetical question in the traditional matter." (*Id.* at pp. 684, 685.)

In light of the holding in *Sanchez*, we conclude Hall's testimony about the prior police contacts with Gil and Martinez, which he had learned from police arrest reports, violated the confrontation clause. (See *Sanchez*, *supra*, 63 Cal.4th at pp. 686, 694 [expert's testimony about, inter alia, defendant's prior police contacts, which was based

[19] The *Sanchez* court further rejected attempts to avoid the hearsay and confrontation problems inherent in such testimony "by giving a limiting instruction that such testimony should not be considered for its truth. If an expert testifies to case-specific out-of-court statements to explain the bases for his opinion, those statements are necessarily considered by the jury for their truth, thus rendering them hearsay." (*Sanchez, supra*, 63 Cal.4th at p. 684.)

on his review of police investigative reports that were not admitted into evidence, constituted testimonial hearsay and was improperly admitted].) We therefore must determine whether appellants were prejudiced thereby, i.e., whether or not the admission of this testimonial hearsay was harmless beyond a reasonable doubt. (See *id.* at p. 698; see also *Chapman v. California* (1967) 386 U.S. 18, 24.)

Although Hall's testimony about appellants' prior police contacts was erroneously admitted, there was additional, stronger evidence on which Hall relied in opining about their involvement with the 18th Street gang, as well as other independent evidence admitted at trial regarding their involvement. This evidence included Gil's gang moniker, Smiley, and the "18" tattoo on his stomach; Martinez's gang moniker, Shadow, and his various 18th Street gang related tattoos; Martinez's acknowledgment that he was an 18th Street gang member and his statement to police that Gil and Rodriguez were also 18th Street gang members; and, most importantly, testimony—supported by cell phone records—regarding their conduct on the night of the shooting, including repeated meetings with various 18th Street gang members, painting over other gangs' tags with the name of the 18th Street gang together with other 18th Street gang members, and participation in the present offenses with those same individuals.

This evidence provided much more compelling support for the jury's gang-related findings than Hall's testimony about several police contacts from years earlier. We therefore conclude the erroneous admission of the testimonial hearsay to show appellants' prior gang involvement was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24; see *People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 415-416 [any error in permitting detective to testify about hearsay bases of his opinion that defendant was a gang member was harmless where prosecution also relied on witness with personal knowledge of defendant's gang involvement to prove his gang affiliation]; compare *Sanchez*, *supra*, 63 Cal.4th at p. 699 [where primary evidence of defendant's intent to benefit gang when, acting alone, he possessed drugs for sale in gang

territory, was expert's recitation of testimonial hearsay, statements concerning defendant's gang affiliation were prejudicial].)[20]

B. *Primary Activities of the 18th Street Gang*

As noted, pursuant to subdivision (f) of section 186.22, " 'criminal street gang' means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its *primary activities* the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (Italics added.)

Both appellants contend the evidence that the primary activities of the 18th Street gang include offenses set forth in subdivision (e) of section 186.22 was insufficient to support either their gang offense convictions or the gang enhancements. (See § 186.22, subd. (f).)

In *People v. Sengpadychith* (2001) 26 Cal.4th 316, 323 (*Sengpadychith*), our Supreme Court explained that "[e]vidence of past or present conduct by gang members involving the commission of one or more of the statutorily enumerated crimes is relevant in determining the group's primary activities," although such evidence is "[n]ot necessarily" (*id*. at p. 323) sufficient on its own to prove the gang's primary activities. "Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute. Also sufficient might be expert testimony, as occurred in *Gardeley*, *supra*, 14 Cal.4th 605." (*Sengpadychith*, at p. 324.)

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[20] Having found that Hall's inadmissible testimony about appellants' past contacts with police was harmless beyond a reasonable doubt in terms of demonstrating their gang related criminal history, we will now more specifically address appellants' claims related to the particular elements of the gang offense and gang enhancement to determine whether, apart from that case-specific testimonial hearsay, substantial evidence supported the convictions and enhancements. (See pts. II.B., II.C., & II.D., *post*.)

In *Gardeley*, a police gang expert testified that the defendant's gang was primarily engaged in two of the felonies enumerated in subdivision (e) of section 186.22. The gang expert based his opinion on conversations he had with the defendant and fellow gang members, on his investigations of hundreds of crimes committed by gang members, and on information from colleagues in his police department and various other law enforcement agencies. (*Gardeley*, *supra*, 14 Cal.4th at p. 620.) The Supreme Court held that this expert testimony provided a basis from which the jury could reasonably find the gang in question satisfied the primary activities element of section 186.22, subdivision (f). (*Gardeley*, at p. 620; see *Sengpadychith*, *supra*, 26 Cal.4th at p. 324.)

In this case, without considering any improperly admitted testimonial hearsay (see *Sanchez*, *supra*, 63 Cal.4th at p. 686; pt. II.A., *ante*), we conclude there is substantial evidence that the primary activities of the 18th Street gang include offenses set forth in subdivision (e) of section 186.22. (See also § 186.22, subd. (f).) Hall, the prosecution's gang expert, opined that the 18th Street gang is a criminal street gang and that its primary activities include weapons possession, assault, assault with deadly weapons including firearms, attempted murder, stabbing, witness intimidation, criminal threats, and some narcotics offenses.[21] He based his opinion on cases he had personally investigated or assisted with, as well as information he had learned from other investigators in Marin County, bulletins distributed in the county regarding gang crimes, and news publications regarding gang crimes occurring in the county.[22]

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[21] All of these offenses, with the exception of "assaults" and "some narcotics offenses" are crimes enumerated in section 186.22, subdivision (e). (See § 186.22, subd. (e)(1), (3), (8), (24), (31).)

[22] Hall's relevant experience included, inter alia, routinely investigating gang-related crimes in Novato, including graffiti vandalism, assaults, shootings, and stabbings, during his five years as a police officer. He had participated in at least 100 hours of gang-related training, had contacted at least 40 Sureño gang members in Marin County, including 5 to 15 members of the 18th Street gang, and his knowledge of the 18th Street gang was based on those contacts, as well as on conversations with other officers and law enforcement agencies, and reviews of reports and field ID cards. He also had participated in gang investigations and arrests, had issued search warrants and spoken with gang

Hall also testified about three predicate offenses, committed within three to eight months of the present offenses by 18th Street gang members, including Andres Celis, convicted in May 2010, of assault with a deadly weapon of a rival gang member and participation in a criminal street gang; Arias Erikson, convicted in August 2010, of robbery and participation in a criminal street gang; and Jimmy Lucero Tejada, convicted in October 2010, of assault with a deadly weapon and participation in a criminal street gang. His testimony was supported by admission into evidence of certified court records.

This evidence of Hall's experience with and knowledge about Sureño gangs generally and the 18th Street gang in particular, evidence of the three 18th Street gang members' convictions of felonies enumerated in subdivision (e) of section 186.22 in the months before the present offenses, together with the facts of the present offenses themselves, provided substantial evidence that the primary activities of the 18th Street gang included offenses described by Hall, which are enumerated in section 186.22, subdivision (e). (See *Gardeley*, *supra*, 14 Cal.4th at p. 620; see also *Vy*, *supra*, 122 Cal.App.4th at p. 1225-1226 [proof of primary activities element was satisfied by evidence of charged crime and two predicate offenses by gang members in 12 weeks before charged crime, as well as expert police witness's testimony regarding gang's engagement in criminal actions that constituted predicate crimes under statute].)

This case is thus distinguishable from *In re Alexander L.* (2007) 149 Cal.App.4th 605, cited by both appellants, in which the gang expert testified only that he "kn[e]w" the gang in question had been involved in certain crimes, without offering any specifics "as to the circumstances of these crimes, or where, when, or how [he] had obtained the information. He did not directly testify that criminal activities constituted [the gang's] primary activities. Indeed, on cross-examination, [the expert] testified that the vast majority of cases connected to [the gang] that he had run across were graffiti related." (*Id.* at pp. 611-612, fn. omitted.) The appellate court found that the expert's conclusory

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members, had also spoken with other law enforcement officers regarding gang crimes, and had reviewed reports of gang crimes.

testimony could not be considered substantial evidence as to the nature of the gang's primary activities. (*Id.* at p. 612.) The court distinguished *Gardeley*, in which "the court knew where the information to which the expert was testifying originated and was able to assess its reliability." (*Alexander L.*, at p. 613.) The *Alexander L.* court further found that evidence admitted at trial of two convictions of purported gang members, without more, did not provide substantial evidence that gang members had " '*consistently and repeatedly*' " committed criminal activity, for purposes of subdivision (f) of section 186.22. (*Alexander L.*, at p. 614; see *Sengpadychith, supra*, 26 Cal.4th at p. 324 .)

Here, although Hall may not have investigated "hundreds of crimes committed by gang members," as had the expert in *Gardeley*, he had contacted at least 40 Sureño gang members in Marin County, had had 5 to 15 law enforcement related contacts with 18th Street gang members, and had spoken with 18th Street gang members about their criminal gang activity, including in Novato. (*Gardeley, supra*, 14 Cal.4th at p. 620.) In addition, like the expert in *Gardeley*, Hall based his opinion about the primary activities of the 18th Street gang on the cases he had personally investigated, as well as on information he had learned from local investigators and other law enforcement agencies. (See *ibid*.) As we have explained, Hall's testimony, together with the evidence of three prior offenses by 18th Street gang members and the charges in the present case provided substantial evidence to support the primary activities element of section 186.22, subdivision (f). (See *Gardeley*, at p. 620; *Vy, supra*, 122 Cal.App.4th at pp. 1225-1226.)

C. *Active Participation in a Criminal Street Gang with Knowledge that Its Members Engage In a Pattern of Criminal Gang Activity*

As noted, section 186.22, subdivision (a) punishes "[a]ny person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang . . . ."

"The gravamen of the substantive offense set forth in section 186.22[, subdivision] (a) is active participation in a criminal street gang. [Our Supreme Court] explained in *People v. Castenada* [(2000)] 23 Cal.4th 743 [(*Castenada*)], that the phrase 'actively

participates' reflects the Legislature's recognition that criminal liability attaching to membership in a criminal organization must be founded on concepts of personal guilt required by due process: 'a person convicted for active membership in a criminal organization must entertain "guilty knowledge and intent' of the organization's criminal purposes.' [Citation.] Accordingly, the Legislature determined that the elements of the gang offense are (1) active participation in a criminal street gang, in the sense of participation that is more than nominal or passive; (2) knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity; and (3) the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of that gang. [Citation.] All three elements can be satisfied without proof the felonious criminal conduct promoted, furthered, or assisted was gang related." (*People v. Albillar* (2010) 51 Cal.4th 47, 55–56 (*Albillar*).)

In demonstrating active participation, "it is not necessary for the prosecution to prove that the person devotes all, or a substantial part, of his or her time or efforts to the criminal street gang, nor is it necessary to prove that the person is a member of the criminal street gang." (§ 186.22, subd. (i).) Still, "[i]t is not enough that a defendant [has] actively participated in a criminal street gang at any point in time . . . . A defendant's active participation must be shown at or reasonably near the time of the crime." (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1509.)

Here, appellants contend there is insufficient evidence that they actively participated in a criminal street gang with the requisite "knowledge that its members engage in or have engaged in a pattern of criminal gang activity." (See § 186.22, subd. (a).) They maintain that no evidence was presented that they knew about the three predicate crimes that demonstrated a pattern of criminal gang activity or that those crimes had been committed by gang members. Gil also asserts that there is no evidence that he was aware of the criminal activities of 18th Street gang members generally. As we shall explain, appellants are mistaken in their interpretation of what is required to satisfy the knowledge element of section 186.22, subdivision (a).

In *People v. Carr* (2010) 190 Cal.App.4th 475 (*Carr*), the appellate court construed the knowledge element of section 186.22, subdivision (a), as did the Supreme Court in *Castenada*, "to correlate to the active membership test described in *Scales* [*v. United States* (1961) 367 U.S. 203, 228], that is, ' "guilty knowledge and intent" of the organization's criminal purposes' [citations], [which] does not require a defendant's subjective knowledge of particular crimes committed by gang members . . . ." (*Carr*, at p. 488, fn. 13, quoting *Castenada*, *supra*, 23 Cal.4th at p. 749.) The *Carr* court further explained that, "just as a jury may rely on evidence about a defendant's personal conduct, as well as expert testimony about gang culture and habits, to make findings concerning a defendant's active participation in a gang or a pattern of gang activity, it may also rely on the same evidence to infer a defendant's knowledge of those activities." (*Carr*, at p. 489, fn. omitted.)

In *Carr*, evidence of the defendant's knowledge of the criminal activities of the gang in question included his admission of gang membership to a police officer, his being contacted by police in the company of a member of a related gang; his wearing of a gang-related tattoo; expert testimony regarding an ongoing feud between the defendant's gang and the murder victims' gang, as reflected in local graffiti and testified to by the expert; the charged murders of rival gang members in gang territory; the defendant's previous conviction of possession of cocaine base for sale; and the expert's testimony that two other gang members had been convicted of qualifying felonies with the previous two years. (*Carr, supra,* 190 Cal.App.4th at p. 489.) The court concluded this evidence was "more than sufficient for the jury to infer [the defendant] knew about the criminal activities of [the gang] and that the [charged] murders were committed for the benefit of the gang." (*Id.* at pp. 489-490.)

In the present case, there is substantial evidence, apart from any improperly admitted testimonial hearsay (see *Sanchez, supra,* 63 Cal.4th at p. 686; pt. II.A., *ante*), demonstrating appellants' knowledge that 18th Street gang members "engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (a).) Some of the evidence demonstrating Gil's knowledge includes the "18" tattoo on his stomach; his

gang moniker, "Smiley"; and Martinez's statement to police that both Gil and Rodriguez were 18th Street gang members. Evidence showing Martinez's knowledge includes his various tattoos related to the 18th Street gang; his gang moniker "Shadow"; and his admission that he was an 18th Street gang member. In addition, evidence that both men knew about the pattern of criminal activities of 18th Street gang members includes Hall's testimony that there were often rivalries between Sureño subsets or cliques; Gil and Martinez's participation in tagging over the graffiti of another local Sureño clique shortly before the shooting, including writing "187," which Hall testified referred to murder; their meetings with 18th Street gang members at various locations on the night of the shooting; and, finally, their participation—together with Rodriguez, another 18th Street gang member—in the current offenses, in which a person associated with yet another rival Sureño clique and another person were shot.

We find that, as in *Carr*, "[t]his evidence is more than sufficient for the jury to infer [appellants] knew about the criminal activities of" the 18th Street gang. (*Carr, supra,* 190 Cal.App.4th at pp. 489-490.)

D. *Gil's Specific Intent to Promote, Further, or Assist in Criminal Conduct by Gang Members*

As noted, the jury in this case found true as to both appellants the enhancement allegation under subdivision (b)(1) of section 186.22, which provides for additional punishment for "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ."

Gil contends there was insufficient evidence to support the finding that he acted with "the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).) Specifically, he argues that the only evidence of his intent to benefit the 18th Street gang was Hall's improper opinion, based on a hypothetical question that included facts from Coyle's testimony, that Gil's conduct was consistent with conduct engaged in by an 18th Street gang member for the benefit and promotion of the gang.

Our Supreme Court has explained that to the extent an expert expresses an opinion in response to a hypothetical question based on the evidence admitted at trial, such testimony does not simply inform the jury of his or her belief about how the case should be resolved. (*People v. Vang* (2011) 52 Cal.4th 1038, 1049 (*Vang*); see also *Sanchez*, *supra*, 63 Cal.4th at p. 684; Evidence Code, § 805 [" 'Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact' "].)

In addition, in *Albillar*, *supra*, 51 Cal.4th at page 66, the Supreme Court found "that the scienter requirement in section 186.22[, subdivision] (b)(1)—i.e., 'the specific intent to promote, further, or assist in any criminal conduct by gang members'—is unambiguous and applies to *any* criminal conduct, without a further requirement that the conduct be 'apart from' the criminal conduct underlying the offense of conviction sought to be enhanced." Thus, "if substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist conduct by those gang members." (*Albillar*, at p. 68; accord, *People v. Livingston* (2012) 53 Cal.4th 1145, 1171.)

In *Albillar*, for example, in which the defendants were charged with forcible rape and digital penetration in concert, the court held there was "ample evidence that defendants intended to attack [the victim], that they assisted each other in raping her, and that they were each members of the criminal street gang. Accordingly, there was substantial evidence that defendants acted with the specific intent to promote, further, or assist gang members in that criminal conduct." (*Albillar*, *supra*, 51 Cal.4th at pp. 59, 68.)

Here, there was substantial evidence, apart from any improperly admitted testimonial hearsay (see *Sanchez*, *supra*, 63 Cal.4th at p. 686; pt. II.A., *ante*), that Gil intended to commit the present offenses together with Martinez and Rodriguez, both 18th Street gang members. In addition to evidence of his gang affiliation—if not membership—the evidence showed that Gil met several times on the night of the shooting with 18th Street gang members and that he, Martinez, and Rodriguez painted

over the graffiti of another Sureño subset, the West Side Wynos.[23] The evidence further showed that he then followed the car of the victims—one of whom was associated with Richmond Sur-Trece, another Sureño subset—to Safeway, at which point Gil said, " 'If I get down, are you guys getting down?' " Finally, the evidence showed that Gil then jumped out of the car and hit the driver's side window with a hammer seconds before Martinez shot into the car, injuring the two victims. (See *Albillar , supra*, 51 Cal.4th at p. 68.)

In addition, Hall opined, in response to a hypothetical question based on evidence presented at trial, that a person who engaged in this conduct would have the specific intent to benefit the 18th Street gang, explaining that there is strength in numbers and more faith in the success of the crime if committed in concert. Hall also testified that tagging over another gang's existing tag is disrespectful and that Gil "would perhaps feel obligated to ensure that he was not disrespected, nor was his gang." Contrary to Gil's claim, Hall did not "simply inform[] the jury of how he felt the case should be resolved." (*People v. Ramon* (2009) 175 Cal.App.4th 843, 851.) Rather, Hall responded to the prosecutor's hypothetical question, giving "the opinion that [the charged offenses] committed in the manner described in the hypothetical question would be gang related. [Hall] did *not* give an opinion on whether [Gil] did commit [the charged offenses] in that way, and thus did *not* give an opinion on how the jury should decide the case." (*Vang, supra,* 52 Cal.4th at p. 1049.)

In sum, there was sufficient evidence of Gil's specific intent to promote, further, or assist criminal conduct of the 18th Street gang to support the true finding on the gang

[23] Gil points out that local resident Richard Oltman testified that he saw the black-painted gang graffiti earlier than when Coyle testified that Gil, Martinez, and Rodriguez had painted over the other two tags. This fact does not, however, mean the jury could not have reasonably relied on Coyle's estimate of the timing, rather than that of Oltman, which was not in any case particularly definitive. (See *People v. Ferraez* (2003) 112 Cal.App.4th 925, 931 ["We do not reweigh evidence or redetermine issues of credibility"].)

enhancement allegation. (See § 186.22, subd. (b)(1); *Albillar*, *supra*, 51 Cal.4th at pp. 66-68.)

III. *Aiding and Abetting Instruction*

Gil and Martinez contend the court erred when it instructed the jury that Gil could be found liable as an aider and abettor of attempted murder based on the natural and probable consequences of the target crime of criminal street gang activity.[24]

A. *Trial Court Background*

The trial court instructed the jury that Gil could be found guilty of the attempted murders of Elias and Lopez as an aider and abettor, based on the natural and probable consequences doctrine, as follows:

"A person may be guilty of a crime in two ways: One, he or she may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator, who directly committed the crime. A person is guilty of a crime whether he or she committed it personally or aided and abetted the perpetrator. Under some specific circumstances, if the evidence establishes aiding and abetting of one crime, a person may also be found guilty of other crimes that occurred during the commission of the first crime. [(See CALCRIM No. 400.)]

"The People allege that Armando Gil is guilty of the crimes charged in counts 1 and 2 as an aider and abettor. The following instructions apply to the charges against Armando Gil pursuant to the aider and abettor theory.

"The Defendant Armando Gil is charged in count 6 with the crime of criminal street gang activity, in violation of Penal Code section 186.22(a); in count 1 with the attempted murder of Elias Agueros; and in count 2 with the attempted murder of Marcos Lopez, in violation of Penal Code Sections 664/187(a).

[24] Although the trial court gave this instruction only as to Gil, Martinez joins in this argument and further contends the court erred in not giving the instruction as to him as well. (See pt. IV., *post*.)

"You must first decide whether the defendant Armando Gil is guilty of the crime of criminal street gang activity, in violation of Penal Code section 186.22(a), as charged in count 6. If you find the defendant Armando Gil is guilty of this crime, count 6, you must then decide whether he is guilty of the crimes of attempted murder, as charged in counts 1 and 2; and under certain circumstances, a person who is guilty of one crime may also be guilty of other crimes that were committed at the same time.

"To prove that the defendant Armando Gil is guilty of attempted murder, as charged in counts 1 and 2, the People must prove that, one, the defendant Armando Gil is guilty of criminal street gang activity, in violation of Penal Code section 186.22(a), as charged in count 6; [two,] during the commission of that crime, criminal street gang activity, in violation of Penal Code Section 186.22(a), as charged in count 6, a co-participant in that crime committed the crimes of attempted murder, as charged in counts 1 and 2; and, three, under all the circumstances, a reasonable person in the defendant Armando Gil's position, would have known that the commission of the crimes of attempted murder, as charged in counts 1 and 2, were natural and probable consequences of the commission of the crime of criminal street gang activity, in violation of Penal Code Section 186.22(a), as charged in count 6.

"A co-participant in a crime is the perpetrator or anyone who aided and abetted the perpetrator. It does not include a victim or an innocent bystander. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.

"If the crimes of attempted murder, as charged in counts 1 and 2, were committed for a reason independent of a common plan to commit the crime of criminal street gang activity, as charged in count 6, then the commission of the crimes of attempted murder, as charged in counts 1 and 2, were not natural and probable consequences of the crime of criminal street gang activity, as charged in count 6. To decide whether the crimes of attempted murder, as charged in counts 1 and 2, were committed, please refer to the separate instructions that I will give you on that crime." (See CALCRIM No. 402.)

The court also instructed the jury on the target crime of criminal street gang activity. (See § 186.22, subd. (a).) The instruction provided in relevant part: "To prove that a defendant is guilty of this crime, the People must prove that, one, the defendant actively participated in a criminal street gang; two, when the defendant participated in the gang, he knew that members of the gang engage in or have engaged in a pattern of criminal gang activity; and, three, the defendant willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang either by, a. directly and actively committing a felony offense, or, b. aiding and abetting a felony offense." (See CALCRIM No. 1400.) The instruction defined "felonious criminal conduct" as "committing or attempting to commit any of the following crimes: Attempted murder, assault with a deadly weapon, or shooting at an occupied vehicle." (See *ibid*.)

The jury found both appellants guilty of the gang offense and the two counts of attempted murder.

B. *Legal Analysis*

" ' "It is fundamental that jurors are presumed to be intelligent and capable of understanding and applying the court's instructions." [Citation.]' [Citation.] ' " 'A defendant challenging an instruction as being subject to erroneous interpretation by the jury must demonstrate a reasonable likelihood that the jury understood the instruction in the way asserted by the defendant. [Citations.]' [Citation.] ' "[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." ' [Citations.]" (*People v. Covarrubias* (2016) 1 Cal.5th 838, 905.) In addition, " '[n]ot every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation.' [Citation.] In reviewing an ambiguous instruction, we inquire whether there is a reasonable likelihood that the jury misunderstood or misapplied the instruction in a manner that violates the Constitution. [Citation.]" (*Id.* at p. 906, quoting *Estelle v. McGuire* (1991) 502 U.S. 62, 72.)

We review the legal adequacy of an instruction de novo. (*People v. Cole* (2004) 33 Cal.4th 1158, 1210.)

" 'Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' [Citation.] But that rule does not apply when . . . the trial court gives an instruction that is an incorrect statement of the law. [Citations.]" (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012; see also *People v. Young* (2005) 34 Cal.4th 1149, 1211 [no forfeiture for failing to object to erroneous instruction if error affected defendant's substantial rights].) In the present case, the court instructed on aiding and abetting liability under the natural and probable consequences doctrine as to Gil, and appellants acknowledge that neither defense attorney objected to the instruction as given. They assert, however, that we should address their contention because the court's instruction was an incorrect statement of the law and affected their substantial rights. Giving appellants the benefit of the doubt, we decline to find the issue forfeited. (See *ibid.*)

Section 31 provides in relevant part: "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission . . . are principals in any crime so committed." In addition, "an aider and abettor is a person who, 'acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime.' [Citation.]" (*People v. Prettyman* (1996) 14 Cal.4th 248, 259 (*Prettyman*), quoting *People v. Beeman* (1984) 35 Cal.3d 547, 561.)

"Under California law, a person who aids and abets a confederate in the commission of a criminal act is liable not only for that crime (the target crime), but also for any other offense (nontarget crime) committed by the confederate as a 'natural and probable consequence' of the crime originally aided and abetted. To convict a defendant of a nontarget crime as an accomplice under the 'natural and probable consequences' doctrine, the jury must find that, with knowledge of the perpetrator's unlawful purpose, and with the intent of committing, encouraging, or facilitating the commission of the

target crime, the defendant aided, promoted, encouraged, or instigated the commission of the target crime. The jury must also find that the defendant's confederate committed an offense other than the target crime, and that the nontarget offense perpetrated by the confederate was a 'natural and probable consequence' of the target crime that the defendant assisted or encouraged." (*Prettyman, supra,* 14 Cal.4th at p. 254.)

In this case, appellants contend CALCRIM No. 402, the instruction on the natural and probable consequences doctrine, directed a verdict for attempted murder because the prosecution expert, Hall, testified that appellants had engaged in criminal street gang activity in the past, which permitted the jury to find them guilty of the target crime, criminal street gang activity, based on outdated and inadmissible evidence of gang activity (see pt. II., A., *ante*) that was unrelated to the charged shooting. Appellants also contend the instruction was fatally ambiguous in that attempted murder was both the greater crime and one of the possible target crimes. We disagree.

The instruction did not direct a verdict for attempted murder based on Hall's testimony that appellants had engaged in criminal street gang activity in the past. First, as already discussed (see pt. II., D., *ante*), Hall did not offer an opinion on whether appellants had committed the gang offense, "and thus did *not* give an opinion on how the jury should decide the case." (*Vang, supra,* 52 Cal.4th at p. 1049.)

Second, the challenged instruction did not permit the jury to find appellants guilty of the target crime of criminal street gang activity based on Hall's improper testimony regarding purported gang activity from years earlier. CALCRIM No. 402 specifically provided that, for Gil to be found guilty of attempted murder, "the People must prove that, one, the defendant Armando Gil is guilty of criminal street gang activity, in violation of Penal Code Section 186.22(a), as charged in count 6; [two,] *during the commission of that crime, criminal street gang activity, . . .* a co-participant in that crime committed the crimes of attempted murder, as charged in counts 1 and 2; and, three, under all the circumstances a reasonable person in the defendant Armando Gil's position, would have known that the commission of the crimes of attempted murder . . . were

natural and probable consequences of the commission of the crime of criminal street gang activity . . . ." (Italics added.)

As shown by the italicized language above, CALCRIM No. 402 plainly told the jury that it could find Gil guilty of the attempted murders as an aider and abettor under the natural and probable consequences doctrine only if it found that *during* the commission of the gang offense, a co-participant in that crime committed the attempted murders. In light of this language, there is no possibility that the jurors could have understood the instruction to permit them to base their finding of guilt on the much earlier gang related conduct to which Hall testified. Rather, the instruction explicitly stated that Gil's participation in the target crime of criminal street gang activity by "willfully assist[ing], further[ing], or promot[ing] felonious criminal conduct[[25]] by members of the gang" (CALCRIM No. 1400) had to occur contemporaneously with a co-participant's commission of attempted murder.

Nor was the instruction ambiguous. The target crime alleged in CALCRIM No. 402 was criminal street gang activity (§ 186.22, subd. (a)), as charged in count 6, not attempted murder. Thus, while attempted murder was listed as one of the possible felonious criminal acts committed by members of the gang, which Gil was alleged to have "willfully assisted, furthered, or promoted" (CALCRIM No. 1400), the target crime of criminal street gang activity plainly was not identical to the greater crime of attempted murder. There is no reasonable likelihood the jury misunderstood or misapplied the instructions in question. (See *Covarrubias*, *supra*, 1 Cal.5th at p. 906.)

IV. *Failure to Give the Aiding and Abetting Instruction as to Martinez*

Martinez contends the trial court erred in instructing the jury on the elements of aiding and abetting under the natural and probable consequences doctrine only as to Gil.

[25] Again, the "felonious criminal conduct" alleged here was the commission or attempted commission of attempted murder, assault with a deadly weapon, or shooting at an occupied vehicle.

A trial court is required to instruct sua sponte on " ' "general legal principles raised by the evidence and necessary for the jury's understanding of the case" ' [citation]. In particular, instructions delineating an aiding and abetting theory of liability must be given when such derivative culpability 'form[s] a part of the prosecution's theory of criminal liability and substantial evidence supports the theory.' [Citation.]" (*People v. Delgado* (2013) 56 Cal.4th 480, 488 (*Delgado*), quoting *Prettyman, supra*, 14 Cal.4th at pp. 264, 266-267.)

Here, the prosecution's theory of the case was that Gil and Martinez, together with their uncharged accomplice, Rodriguez, were co-participants in the attempted murders, but that Martinez was directly liable as the shooter. The vast majority of the prosecution evidence and the prosecutor's closing arguments related to this theory. It is true, however, that the prosecutor did briefly state during closing argument that Martinez could be found guilty of attempted murder as an aider and abettor under the natural and probable consequences doctrine: "Even if you determine that the shooter was Mousey [Rodriguez], if you find that they are 18th Street gang members right here actively participating, and you find them liable natural and probable consequences [*sic*], they're all liable." The prosecutor subsequently stated that "[w]hen all three of them get out of the car" and "go toward the white car," "they're pretty much liable for the natural, foreseeable consequences of what may go down" and that, under the aiding and abetting instruction, "[i]f the defendant helped with the intent to help, he is responsible for the result."

Martinez's defense theory was that he was at home, in bed, at the time of the shooting, and the majority of his defense evidence related to this theory. Also, in closing argument, Martinez's attorney spent quite a bit of time explaining to the jury that, in light of the instructions given, it was foreclosed from considering whether Martinez could be found guilty as an aider and abettor. For example, before going into more detail about the applicability of specific instructions, counsel stated, "Several legal instructions that Judge Boren read to you on Friday and Monday dictate that your only task as to

[Martinez] is to decide whether the People proved beyond a reasonable doubt by credible evidence that [Martinez] was the shooter in this case."

The evidence and arguments thus clearly focused on whether the evidence showed that Martinez was the shooter. Moreover, even assuming it could be argued, based on the prosecutor's brief mention of aiding and abetting in relation to Martinez, that derivative culpability formed a part of the prosecution's theory of liability on the attempted murder charge as to Martinez *and* that the theory was supported by substantial evidence (*Delgado, supra*, 56 Cal.4th at p. 488), we would find the court's erroneous failure to instruct harmless. (See *id*. at p. 492.)

In *Delgado*, our Supreme Court found that the court's error in failing to instruct the jury on accomplice liability with respect to the defendant on the asportation element of kidnapping was not of federal constitutional dimension because it "did not constitute failure to instruct on an element of the offense and did not unconstitutionally lessen the People's burden of proof." (*Delgado, supra*, 56 Cal.4th at pp. 489-490.) Nor was there a reasonable likelihood the jury applied the instructions given in a way that deprived the defendant of his constitutional rights. As the court explained: "For the jury to find defendant guilty of kidnapping, on the evidence before it, without finding either that he personally moved the victim or that he harbored the requisite mental state to be indirectly liable for the driver's asportation, would verge on the irrational." (*Id.* at p. 491.)

The *Delgado* court then determined that the failure to instruct on accomplice liability was harmless under the state error of *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (*Delgado, supra*, 56 Cal.4th at p. 492.) As the court observed: " '[I]t is hard to imagine how an aiding and abetting instruction would have helped [defendant], as it would have merely offered an alternative, additional means of establishing asportation without having to prove [defendant] took part in transporting the victim.' " (*Delgado*, at p. 492)

In the present case, we do not agree with Martinez that the prosecutor's comments during closing argument suggested that he could be found guilty of attempted murder under the natural and probable consequences doctrine merely because he got out of

Coyle's car and walked toward the white car. In context, the prosecutor was stating that if the three men acted with the intent to commit the target crime of criminal street gang activity under section 186.22, subdivision (a), "then they're all liable for the foreseeable consequences." Moreover, the evidence and argument were primarily focused on whether Martinez was directly liable for the attempted murder as the shooter. In addition, the jury *did* receive proper instruction, albeit geared to Gil, regarding the necessary elements for finding derivative liability under the natural and probable consequences doctrine, as well as regarding the required intent and the need for proof beyond a reasonable doubt. For these reasons, like the *Delgado* court, we conclude there is no reasonable likelihood "that the jury filled the gap created by the absence of complicity instructions [as to Martinez] in a manner that excused the prosecution from proving the facts essential to an aiding and abetting theory." (*Delgado*, *supra*, 56 Cal.4th at pp. 491-492.) Hence, any error was not one of constitutional dimension. (See *id.* at p. 490.)

Also like the court in *Delgado*, we find the alleged error was harmless under state law. (See *Delgado*, *supra*, 56 Cal.4th at p. 492; *Watson*, *supra*, 56 Cal.4th at p. 836.) First, the vast majority of the prosecution evidence and argument regarding Martinez's involvement in the attempted murders related to his being the direct perpetrator, and the defense argument and alibi evidence attempted to show that he simply was not present at the time of the offenses.

Second, the evidence showed that Coyle saw Martinez with the gun and also saw him shooting at the white car. Cell phone evidence showed that Martinez's cell phone was in the area of the Bay Vista apartments and Safeway around the time of the shooting, and his story that he had loaned his phone to Rodriguez was belied by text messages and phone calls to Jocelyn from that phone just before the shooting, notwithstanding Jocelyn's improbable testimony that it was Rodriguez who first called her and then texted her, responding to her earlier news that she was pregnant.

The evidence also showed that Martinez, an active gang member, met with other gang members before the shooting, was with Gil and Rodriguez when they painted over other gang graffiti and followed the white car from the Bay Vista apartments to the

Safeway, and that he got out of Coyle's car with Gil and Rodriguez just after Gil said, " 'If I get down, are you guys getting down?' " Sergeant Jenner also testified that the store's surveillance video showed three people surrounding the white car and Officer Ramirez testified that witness Mary Eid told him she saw three people near the car—two near the rear passenger side and one near the rear driver side—although at trial she claimed she only saw two people. In addition, after the shooting, Martinez and Rodriguez exchanged a number of text messages, such as: " 'Hey fool, we need to get to Richmond . . . ,' " " 'Smiley's girl got arrested' " and " 'She might snitch us out . . . .' "

In light of the strong evidence of shared specific intent, which demonstrated that Martinez and the other two participants intentionally cooperated in the gang-related attack on the victims, as well as other evidence showing Martinez's involvement in the incident and the relevant instructions given at trial, it is not reasonably probable that the jury convicted Martinez based solely on his presence at the shooting scene or that the result would have been different had the court told the jury that it could convict him of attempted murder on an aiding and abetting theory under the natural and probable consequences doctrine. (See *Delgado*, *supra*, 56 Cal.4th at p. 492; *Watson*, *supra*, 46 Cal.2d at p. 836.)[26]

[26] Martinez points out that the jury was unable to reach a verdict on the assault with a firearm and shooting an occupied vehicle counts and related enhancement allegations. He asserts this shows that "at least one juror found Martinez was not the shooter, and thus he could only have been convicted as an aider and abettor, despite the absence of instructions on this theory as to Martinez." Under section 954, however, which provides that "[a]n acquittal of one or more counts shall not be deemed an acquittal of any other count," and "inherently inconsistent verdicts are allowed to stand" if they are otherwise supported by substantial evidence. (*People v. Lewis* (2001) 25 Cal.4th 610, 656.) This rule is also applicable to inconsistent enhancement findings and enhancement findings that are inconsistent with the verdict on a substantive offense. (*People v. Miranda* (2011) 192 Cal.App.4th 398, 405; *People v. York* (1992) 11 Cal.App.4th 1506, 1510.) Such inconsistencies "may show no more than jury lenity, compromise, or mistake, none of which undermines the validity of a verdict. [Citations.]" (*Lewis*, at p. 656.) Here, for the reasons set forth in the harmless error discussion (see text, *ante*), the attempted murder verdicts against Martinez were plainly

V. *Instructions on Attempted Premeditated Murder under the Natural and Probable Consequences Doctrine*

Both appellants contend the trial court erred when it instructed the jury that Gil could be found guilty of attempted premeditated murder under the natural and probable consequences doctrine. In so arguing, they rely on our Supreme Court's recent holding in *Chiu, supra,* 59 Cal.4th at pages 158-159 "that an aider and abettor may not be convicted of first degree *premeditated* murder under the natural and probable consequences doctrine. Rather, his or her liability for that crime must be based on direct aiding and abetting principles. [Citation.]"

The *Chiu* court, however, distinguished the case before it from *People v. Favor* (2012) 54 Cal.4th 868 (*Favor*),[27] in which the court had "held that under the natural and probable consequences doctrine as applied to the premeditation allegation under section 664, subdivision (a) . . . , a trial court need only instruct that the jury find that attempted murder, not attempted *premeditated* murder, was a foreseeable consequence of the target offense. [Citation.] The premeditation finding—based on the direct perpetrator's mens rea—is determined after the jury decides that the nontarget offense of attempted murder was foreseeable. [Citation.]" (*Chiu, supra,* 59 Cal.4th at p. 162, citing *People v. Favor,* at pp. 872, 879-880.)

The Supreme Court in *Chiu* further distinguished *Favor* as follows: "Unlike *Favor*, the issue in the present case does not involve the determination of legislative intent as to whom a statute applies. Also, unlike *Favor,* which involved the determination of premeditation as a requirement for a statutory penalty provision, premeditation and deliberation as it relates to murder is an element of first degree murder. In reaching our result in *Favor,* we expressly distinguished the penalty provision at issue there from the substantive crime of first degree premeditated murder on the ground that

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supported by substantial evidence, and we will not speculate as to the reason for the inconsistencies in the verdicts. (See § 954; *Lewis*, at p. 656.)

[27] The continuing viability of *Favor* is currently before the Supreme Court in *People v. Mateo* (Feb. 10, 2016, B258333), review granted May 11, 2016, S232674.

the latter statute involved a different *degree* of the offense. [Citation.] Finally, the consequence of imposing liability for the penalty provision in *Favor* is considerably less severe than in imposing liability for first degree murder under the natural and probable consequences doctrine. Section 664[, subdivision] (a) provides that a defendant convicted of attempted murder is subject to a determinate term of five, seven, or nine years. If the jury finds the premeditation allegation true, the defendant is subject to a sentence of life with the possibility of parole. (*Ibid.*) With that life sentence, a defendant is eligible for parole after serving a term of at least seven years. (§ 3046, subd. (a)(1).) On the other hand, a defendant convicted of first degree murder must serve a sentence of 25 years to life. (§ 190, subd. (a).) He or she must serve a minimum term of 25 years before parole eligibility. (§ 3046, subd. (a)(2).) A defendant convicted of second degree murder must serve a sentence of 15 years to life, with a minimum term of 15 years before parole eligibility. (§§ 190, subd. (a), 3046, subd. (a)(2).)" (*Chiu*, *supra*, 59 Cal.4th at p. 163.)

Appellants challenge the logic of any purported distinction between attempted and completed premeditated murder in the context of the natural and probable consequences doctrine. Because the Supreme Court in *Chiu* did not question the continued viability of *Favor*, but simply distinguished it, we are presently bound by the holding in *Favor*. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

VI. *Exclusion of Rodriguez's Facebook Statements*

Both appellants contend the court erred and violated their constitutional right to present a defense when it excluded Rodriguez's statements on Facebook that he had shot the victims. They claim the statements were admissible as declarations against penal interest under Evidence Code section 1230.

A. *Trial Court Background*

Before trial, Martinez's counsel moved in limine to admit evidence under Evidence Code section 1230 regarding statements Rodriguez had made in Facebook messages to two female friends about his involvement in the Safeway shooting. Counsel reported that Rodriguez apparently had fled to Mexico shortly after the shooting, and had

subsequently exchanged a series of Facebook messages with two teenage girls between February and July 2011. The two girls, Briana D. and Paula C., had provided printouts of the messages to Martinez's counsel. Gil's counsel joined in the motion.

At a hearing on the motion, in which Gil's attorney joined, the trial court summarized the relevant Facebook exchanges as follows:

"The first writing of significance was posted on July 2, 2011. There were earlier postings in February and March that are part of the exhibit, but I don't see them as being relevant to the issues here.

"On July 2, 2011, [Rodriguez] wrote, 'The pigs,' or police, 'are looking for me,' to which Briana D[.] . . . asks, 'What did you do?' Rodriguez responds, 'Just go to Marin IJ dot com, put "Shooting in Novato." ' [Briana D.] then next asks, 'Was it you who shot?' . . . . [¶] On July 3, 2011, Rodriguez replies, 'Na, I never got shot. We shot some bitches.' [Briana D.] replies by another question, 'Who was the one who shot Justin's brother? . . . The reply to that question comes the next day, July 4, 2011, and again, Rodriguez responds, 'I don't know. All I know is that they were some 13's' . . . . [¶] . . . .

"Briana's reply to the statement by Rodriguez . . . is, 'I'm not going to tell no one, brother.' Rodriguez responds with a question, 'What does he bang,' b-a-n-g, 'you know?'[28] . . . . [¶] . . . . [A]nd then he responds, . . . "Well, I don't know who I shot. All I know is that they were in the car, and we shot those niggas,' . . . 'but I don't know who they—who are there. All I know is that they're,' quote, '13,' unquote.

"There are other Facebook postings that begin on July 7 in which Rodriguez apparently replies to some questions or statements put on the Facebook page by Paula C[.], and . . . she says on July 7th in her posting, 'I heard the police is looking for you. Why?' Question mark. 'What did you do?' Rodriguez replies, 'I shot some niggas,' . . .

[28] The court believed "it could be reasonably inferred that the reference [i.e., 'what does he bang?'] is to the last mentioned person, Justin's brother, who was referred to apparently as one of the shooting victims."

and [Paula C.] responds, 'What? Why? When?' And Rodriguez responds, 'Yes, I shot some fools in Novato like five months ago. Just go to Marin IJ dot com and put "Shooting in Novato." '

"The response from [Paula C.] comes five days later, on July 12th 2011, and she responds or asks, 'How many times did you shoot them?' To which Rodriguez responds, 'Three times each?' Question mark. 'Well, me and some other homie. Just don't say shit, okay?'

The court then discussed the requirements for admission of statements against penal interest under Evidence Code section 1230, first stating that "for purposes of deciding this[;] . . . sufficient evidence could be presented to show that Rodriguez is the author of the statements, that is, he is the declarant. Secondly, that he is, Rodriguez, unavailable, and also, that some of the portions, at least, of the declaration are against his penal interest within the meaning of section 1230. But the analysis doesn't end there. The court then discussed a number of cases before continuing:

"And in examining these statements that are attributable to Rodriguez, as set forth in the attachment to the brief on it, it is clear that Rodriguez is not consistent. He is inconsistent regarding critical elements or components in his statements. . . . [¶] . . . [¶]

"[T]hese inconsistencies that I point out about whether it's 'I' or 'we' and what he knows I think are significant. For instance, the question I think that would be asked in cross-examination is what's the significance between the switch between 'I' and 'we'? And, also, if . . . 'we' includes 'him,' does that mean that multiple people who make up the 'we' both or all fired one gun at different times, the same gun at the same time, or two or more guns at the same or different times?

"And thirdly, what does he mean when he said, quote, 'All I know is,' unquote. Why was the question mark put after the words 'three times each' when asked as to the number of shots that were fired? And the fifth question, 'Why did you shoot them?' He doesn't really answer it, but he says, 'Well me and some other homie.' What does that mean? Why was that the answer? Who is the other homie, and what did that person do? And seventh, why did he ask, 'What does he bang?' Which I understand to mean what

gang is he a member of? If he already knew that they were 13, why was he asking, unless he didn't think that Justin's brother was one of those that were shot.

"So there are a number of questions that could be asked, and those are legitimate in analyzing hearsay statements like this to see if they fall within the exception. As a matter of fact, it was *People v. Arceo* [(2011) 195 Cal.App.4th 556 that] . . . observed, quote, 'When a court can be confident that the declarant's truthfulness is so clear from the surrounding circumstances . . . that the test of cross-examination would be of marginal utility, the Sixth Amendment's residual trustworthiness test allows the admission of the declarant's statements.

"Put somewhat differently, are the statements by Rodriguez so trustworthy, that adversarial testing or cross-examination would add little to their reliability? And I think the answer to that question is clearly in the negative, and since the focus of the 1231 [*sic*] test is the reliability of it, I conclude that cross-examination, even on just the three questions that I posed after my reading of all that—I think that would illuminate the issues and be of significant value in showing the truth or falsity of the declarations; and for that reason, I cannot be confident that his truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility. . . . [¶] [T]hose statements and testimony related to them will be excluded." The court therefore excluded Rodriguez's statement.

B. *Legal Analysis*

Evidence Code section 1230 provides in relevant part: "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, . . . so far subjected him to the risk of . . . criminal liability, . . . or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true."

" 'The focus of the declaration against interest exception to the hearsay rule is the basic trustworthiness of the declaration. [Citations.] In determining whether a statement

is truly against interest within the meaning of Evidence Code section 1230, and hence is sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant.' [Citation.] '[E]ven when a hearsay statement runs generally against the declarant's penal interest and redaction has excised exculpatory portions, the statement may, in light of circumstances, lack sufficient indicia of trustworthiness to qualify for admission. . . . [¶] . . . We have recognized that, in this context, assessing trustworthiness " 'requires the court to apply to the peculiar facts of the individual case a broad and deep acquaintance with the ways human beings actually conduct themselves in the circumstances material under the exception.' " ' [Citation.]" (*People v. Geier* (2007) 41 Cal.4th 555, 584 (*Geier*), overruled on other grounds in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305; accord, *People v. Duarte* (2000) 24 Cal.4th 603, 611 [statement must be "sufficiently reliable to warrant admission despite its hearsay character"]; *People v. Arceo*, *supra*, 195 Cal.App.4th at p. 577 [" '[w]hen a court can be confident . . . "the declarant's truthfulness is so clear for the surrounding circumstances that the test of cross-examination would be of marginal utility," the Sixth Amendment's residual "trustworthiness" test allows the admission of the declarant's statements' "].)

A trial court's decision to admit or exclude evidence is a matter committed to its discretion " ' "and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." ' [Citation.]" (*Geier*, *supra*, 41 Cal.4th at p. 585.)

In *Geier*, our Supreme Court found no abuse of discretion in the trial court's refusal to admit, under Evidence Code section 1230, one of a declarant's several statements because "it failed to meet the exception's threshold requirement of trustworthiness" in that "the first and third statements were 'virtually mutually contradictory which indicated that . . . at least one of the versions was unreliable because it was contradicted by another version.' " (*Geier, supra*, 41 Cal.4th at pp. 584, 585.)

Here, the court articulated its concerns about the reliability of Rodriguez's Facebook statements. Although it found, for purposes of deciding the motion, that Rodriguez was unavailable and his statements were against his penal interest, as is required by Evidence Code section 1230, it also found that Rodriguez was "inconsistent regarding critical elements or components in his statements," and the statements were therefore lacking in trustworthiness and reliability. (See *People v. Duarte*, *supra*, 24 Cal.4th at p. 611.) As the court explained, not only did Rodriguez shift between the use of "I" and "we" in describing the shooting, several of his other comments raised questions about what he had in fact done and what he actually knew about the details of the shooting. These inconsistent and ambiguous statements included, for example, his response to the question of how many times he had shot the victims, in which he stated, " 'Three times each" with a question mark and then stated, "Well, me and some other homie.' " He also responded to the question of who shot Justin's brother, with " 'I don't know. All I know is that they were some 13's' " and " 'Well, I don't know who I shot. All I know is that they were in the car, and we shot those niggas, but I don't know who are there. All I know is that they're 13.' "

In light of these inconsistencies in Rodriguez's statements, the court did not exercise "its discretion in an arbitrary, capricious, or patently absurd manner" when it concluded the statements were not sufficiently trustworthy to be admissible under Evidence Code section 1230. (*Geier, supra*, 41 Cal.4th at pp. 584-585.) Indeed, the court heard extensive argument on this issue, carefully considered the relevant law and circumstances, and reached a reasonable conclusion, based on the facts of the case.[29]

[29] The circumstances and content of Rodriguez's statements—including his unsolicited disclosure of the shooting to Briana D. and his suggestion to each girl that she look up the shooting on a local news website—also suggest that he could have been exaggerating his role in the shooting to impress these two teenage girls, which further undermines the trustworthiness of his ambiguous statements. (See *People v. Grimes* (2016) 1 Cal.5th 698, 719 [noting that "some offenders may attempt to enhance their reputations by bragging about crimes they did not commit or exaggerating the extent of their responsibility for a criminal act"]; cf. *People v. Gonzales* (2011) 52 Cal.4th 254, 292

Accordingly, it did not abuse its discretion when it concluded that Rodriguez's Facebook statements, " 'in light of circumstances, lack[ed] sufficient indicia of trustworthiness to qualify for admission." (*Geier , supra*, 41 Cal.4th at pp. 584, 585; see also *People v. McCurdy* (2014) 59 Cal.4th 1063, 1109 [no abuse of discretion in excluding extrajudicial hearsay statements that were against unavailable declarant's penal interest where trial court reasonably found statements were unreliable].)[30]

VII. *Stay of Martinez's Gang Offense Sentence*

Martinez contends punishment on the gang offense count should have been stayed under section 654 since he was found guilty of attempted murder based on the same underlying conduct. Respondent agrees.

At sentencing, both Gil's and Martinez's attorneys argued that section 654 barred punishment on count 6, the gang offense conviction because the incident on which it was based was inseparable from the attempted murders, and that sentencing on the gang offense count should therefore be stayed. The prosecutor agreed that count 6 should be stayed. The trial court, however, rejected the argument, stating: "[A]s to the count 6, I don't think that should be run either concurrently, nor do I believe [section] 654 prevents its placement. The fact that that count was found to be true as to both defendants, that is guilty verdicts were found, that count is not an element or essential to either count of attempted murder, so I think it is appropriate to impose the punishment of three years as to that count."

[gang expert testified that gang members sometimes brag to other gang members and take credit for crimes they did not commit: " 'It's like embellishing. You know, I was there; well, take credit for the shooting also' "].)

[30] In light of our finding that the trial court did not abuse its broad discretion in excluding the proffered evidence after finding that it was untrustworthy and unreliable, we reject appellants' claim that its exclusion violated their due process right to present a defense. (See, e.g., *People v. Cudjo* (1993) 6 Cal.4th 585, 611 [" 'As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's [constitutional] right to present a defense' "].)

Section 654, subdivision (a) provides in relevant part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." In *People v. Mesa* (2012) 54 Cal.4th 191, 200 (*Mesa*), in which the defendant was convicted of both the gang offense and other underlying felonies that occurred during the same incident, our Supreme Court held that section 654 prohibited punishment for both the gang offense and the substantive offense when both offenses were based on the same act. As the court explained: "For each shooting incident, defendant's sentence for the gang crime violates section 654 because it punishes defendant a second time either for the assault with a firearm or for possession of a firearm by a felon. 'Here, the underlying [felonies] were the act[s] that transformed mere gang membership—which, by itself, is not a crime—into the crime of gang participation.' [Citation.] . . . Section 654 applies where the 'defendant stands convicted of both (1) a crime that requires, as one of its elements, the intentional commission of an underlying offense, and (2) the underlying offense itself.' [Citation.]" (*Mesa*, at pp. 197-198.)

In this case, the court instructed the jury that, for purposes of the gang offense, "felonious criminal conduct" means "committing or attempting to commit any of the following crimes: Attempted murder, assault with a deadly weapon, or shooting at an occupied vehicle." The jury found Gil and Martinez guilty of the gang offense and two counts of attempted murder, which plainly arose from the same conduct. Therefore, as in *Mesa*, section 654 prohibits punishment for both the gang offense and the attempted murders. (See *Mesa*, *supra*, 54 Cal.4th at p. 200.)

The proper remedy is to stay the sentence on the conviction carrying the lesser punishment. (See § 654.) Since the attempted murders formed the underlying bases for the section 186.22, subdivision (a) conviction, and since the attempted murder convictions have the longest term of imprisonment, the three-year term for the gang

offense must be stayed under section 654 as to both appellants. (See *Mesa*, *supra*, 54 Cal.4th at pp. 200-201.)[31]

VIII. *Martinez's Proposition 57 Claim*

As already noted, Martinez was 16 years old at the time of the present offenses. The prosecutor filed the charges against him directly in adult criminal court, as was permitted at the time under former Welfare and Institutions Code section 707, subdivisions (b)(12) and (d)(1) and (2).[32] On November 8, 2016, while this appeal was pending, Proposition 57 became effective. Among other changes, Proposition 57 amended Welfare and Institutions Code sections 602 and 707 to eliminate direct filing by prosecutors. (Prop. 57, §§ 4.1 & 4.2.) Under Proposition 57, certain categories of minors can still be tried in criminal court,[33] but only after a juvenile court judge holds a hearing to consider various factors, including the minor's maturity, degree of criminal

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[31] Although Gil did not raise this issue on appeal, "[t]he erroneous failure to stay punishment under section 654 may be raised on the reviewing court's own motion and corrected by the appellate court. [Citation.]" (*People v. Price* (1986) 184 Cal.App.3d 1405, 1411, italics omitted; cf. *People v. Le* (2006) 136 Cal.App.4th 925, 931 [" 'It is well settled . . . that the court acts "in excess of its jurisdiction" and imposes an "unauthorized" sentence when it erroneously stays or fails to stay execution of a sentence under section 654' and therefore a claim of error under section 654 is nonwaivable"], quoting *People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 17.) For this reason, and because the issue has been fully briefed as to Martinez, we shall grant the same relief to Gil.

[32] These former provisions of Welfare and Institutions Code section 707 became law in 2000, pursuant to Proposition 21, the Gang Violence and Juvenile Crime Prevention Act of 1998 (Proposition 21). Proposition 21 described the provisions' purpose: "Dramatic changes are needed in the way we treat juvenile criminals, criminal street gangs, and the confidentiality of the juvenile records of violent offenders if we are to avoid the predicted, unprecedented surge in juvenile and gang violence. Californians deserve to live without fear of violent crime and to enjoy safe neighborhoods, parks, and schools. This act addresses each of these issues with the goal of creating a safer California, for ourselves and our children, in the Twenty-First Century." (Prop. 21, § 2(k); see also Prop. 21, § 26.)

[33] These include all cases involving a minor who was 16 years of age or older at the time of the offense or minors who were 14 or 15 years of age and are alleged to have committed certain very serious crimes. (§ 707, subds. (a)(1) & (b).)

sophistication, prior delinquent history, and potential for rehabilitation. (Welf. & Inst. Code, § 707, subd. (a)(1) & (2).)

After we filed an unpublished opinion staying the sentence for the gang offense as to both appellants but otherwise affirming the judgment, Martinez filed a petition for rehearing in which he contended that Proposition 57 applies retroactively to his case. Ordinarily, we will not address an issue raised for the first time in a petition for rehearing. (See *People v. Vela* (2017) 11 Cal.App.5th 68, 72 (*Vela*), review granted July 12, 2017, S242298.) "When good cause exists, however, we may exercise our discretion to address issues first raised on rehearing." (*Alameda County Management Employees Assn. v. Superior Court* (2011) 195 Cal.App.4th 325, 338, fn. 10; accord, *Vela*, at p. 72.) Here, we have granted the petition for rehearing and exercise our discretion to address whether Martinez is entitled to relief under Proposition 57.

Martinez contends the provisions of Proposition 57 that eliminated direct filing are retroactively applicable to him because his case is not yet final. The issue of Proposition 57's retroactivity is currently pending before our Supreme Court. (*People v. Superior Court* (*Walker*) (2017) 12 Cal.App.5th 687, review granted Sept. 13, 2017, S243072; *People v. Marquez* (2017) 11 Cal.App.5th 816, review granted July 26, 2017, S242660; *Vela*, *supra*, 11 Cal.App.5th 68, review granted July 12, 2017, S242298; *People v. Mendoza* (2017) 10 Cal.App.5th 327, review granted July 12, 2017, S241647; *People v. Superior Court* (*Lara*) (2017) 9 Cal.App.5th 753, 774, review granted May 17, 2017, S241231; *People v. Cervantes* (2017) 9 Cal.App.5th 569, review granted May 17, 2017, S241323.) Three other recent published opinions also addressed this issue, but review had not yet been granted as of the date of the filing of this opinion. (See *People v. Suarez* (2017) ____ Cal.App.5th ____ [2017 WL 5988348]; *People v. Brewer* (2017) ____ Cal.App.5th ____ [2017 WL 5507802]; *People v. Pineda* (2017) 14 Cal.App.5th 469, review filed Sept. 21 and Sept. 25, 2017 (*Pineda*).)

The appellate courts in all of these published opinions except *Vela* and *Pineda* have concluded that Proposition 57's elimination of direct filing authority is prospective only, and does not apply to a juvenile convicted before it took effect, even if that

juvenile's case is not yet final. "But we exercise judgment not by counting the number of published opinions on either side of an issue but rather by assessing the persuasiveness of the reasons offered for reaching one outcome or another." (*Pineda*, *supra*, 14 Cal.App.5th at p. 479.) As did the court in *Pineda*, we adopt the reasoning of the *Vela* court and conclude Proposition 57 applies retroactively to cases pending on appeal. (See *Vela*, *supra*, 11 Cal.App.5th at p. 71; *Pineda*, at p. 478.)

Because our Supreme Court will soon resolve the retroactivity question and Division Three of the Fourth District in *Vela* and Division Five of the Second District in *Pineda* have already analyzed it thoroughly, there is no reason to engage in an in-depth discussion of the issue in this opinion. But we will note, first, that we agree with the court in *Vela* that in the 16 years between the passage of Proposition 21 in 2000, and the passage of Proposition 57, "there had been a sea change in penology regarding the relative culpability and rehabilitation possibilities for juvenile offenders . . . ." (*Vela*, *supra*, 11 Cal.App.5th at p. 75.) The stated purposes of Proposition 57 reflected this sea change, with the ballot pamphlet itself describing those purposes: " ' "Stop the revolving door of crime by emphasizing rehabilitation, especially for juveniles"; and "Require a judge, not a prosecutor, to decide whether juveniles should be tried in adult court." (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) text of Prop. 57, Public Safety and Rehabilitation Act of 2016, § 2, p. 141.)" ' " (*Vela*, at p. 75.) Proposition 57 further provided: " 'This act shall be liberally construed to effectuate its purposes.' (Voter Information Guide, Gen. Elec., *supra*, text of Prop. 57, Public Safety and Rehabilitation Act of 2016, § 9, p. 146.) [¶] Thus, while the intent of the electorate in approving Proposition 21 was to broaden the number of minors subject to adult criminal prosecution, the intent of the electorate in approving Proposition 57 was precisely the opposite. That is, the intent of the electorate in approving Proposition 57 was to broaden the number of minors who could potentially stay within the juvenile justice system, with its primary emphasis on rehabilitation rather than punishment." (*Vela*, at pp. 75-76.)

Second, we agree with *Vela* that the rule of *In re Estrada* (1965) 63 Cal.2d 740, 744-745 (*Estrada*), under which a statute potentially reducing the penalty for an offense

is presumed to apply to cases not yet final, is applicable here because when "a change in the law allows a court to exercise its sentencing discretion more favorably for a particular defendant, the reasoning of *Estrada* applies." (*Vela*, *supra*, 11 Cal.App.5th at p. 79; accord, *Pineda*, *supra*, 14 Cal.App.5th at pp. 481-483.)[34] Under Proposition 57, the possibility of a juvenile disposition instead of a prison sentence, which would almost certainly result in less time in custody, effects a reduction in punishment that is covered by the *Estrada* rule. (See *Vela*, at pp. 79-80; *Pineda*, at pp. 481-483.)

For these reasons, "we infer that the electorate intended the possible ameliorating benefits of Proposition 57 to apply to every minor to whom it may constitutionally apply," including Martinez. (*Vela*, *supra*, 11 Cal.App.5th at p. 81; accord, *Pineda*, *supra*, 14 Cal.App.5th at pp. 482-483.) Having found that the statutory amendments under Proposition 57 apply retroactively, we will conditionally reverse the judgment as to Martinez and remand the matter for a transfer hearing before the juvenile court, at which

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[34] In *Estrada*, our Supreme Court set forth an exception to the general rule that legislative changes operate prospectively: "When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final. This intent seems obvious, because to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology." (*Estrada*, *supra*, 63 Cal.2d at p. 745; *Vela*, *supra*, 11 Cal.App.5th at p. 77.)

The *Vela* court also relied on *People v. Francis* (1969) 71 Cal.2d 66, 75-76, in which the Supreme Court found the reasoning of *Estrada* applicable to a statutory amendment that gave judges the discretion to reduce a crime from a felony to a misdemeanor in some cases. (See *Vela*, *supra*, 11 Cal.App.4th at pp. 79-80; compare *People v. Brown* (2012) 54 Cal.4th 314, 325 [finding reasoning of *Estrada* inapplicable to an amended statute that increased rate at which prisoners could earn credits for good behavior because statute did not alter penalty for any crime, but instead applied only to future conduct].)

"the juvenile court shall, to the extent possible, treat the matter as though the prosecutor had originally filed a juvenile petition in juvenile court and had then moved to transfer [Martinez's] cause to a court of criminal jurisdiction. (§ 707, subd. (a)(1)." (*Vela*, at p. 82; accord, *Pineda*, at pp. 483-484.)

DISPOSITION

Gil's and Martinez's three-year consecutive sentence on count 6, the gang offense, is stayed. The judgment is otherwise affirmed as to Gil. The judgment as to Martinez is conditionally reversed, and the case is remanded to the juvenile court with directions to conduct a transfer hearing pursuant to Welfare and Institutions Code section 707, subdivision (a), if the prosecution moves for such a hearing, no later than 90 days from the filing of the remittitur. If, at the transfer hearing, the court determines it would have transferred Martinez to a court of criminal jurisdiction, then the judgment shall be reinstated as of the date of that determination. If, at the transfer hearing, the court determines it would not have transferred Martinez to a court of criminal jurisdiction, it shall treat Martinez's convictions and enhancements as juvenile adjudications as of the date of that determination. The juvenile court shall then conduct a dispositional hearing and impose an appropriate disposition under juvenile law within its usual time frame.

_____
Kline, P.J.

We concur:

_____
Richman, J.

_____
Stewart, J.

People v. Martinez-Carreon et al. (A141670 & A141679)